

TITLE PAGE.

~~THE~~ LEGAL ASPECTS OF THE CENTRAL ROLE OF
THE UNITED NATIONAL INDEPENDENCE PARTY
IN ZAMBIA.

by

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A Thesis for the Internal Degree
of Doctor of Philosophy in the
Faculty of Laws of the University
of London, School of Oriental and
African Studies.

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ABSTRACT.

This Thesis sets out to consider the effects of law on the status of a political party, namely the United National Independence Party in Zambia, and to determine the extent and nature of its role. There is no doubt that political parties are important social and political institutions although not much has been written about their legal origins, status and role. Constitutional lawyers prefer to avoid any reference to political parties if they can.

This thesis examines some legal aspects of the evolution and role of the United National Independence Party. The study consists of eleven Chapters. Chapter I traces the historical development of political parties in the Commonwealth and looks at some definitions of 'political party'. Chapter II sets out the historical background to the constitutional development of the Republic of Zambia. Chapter III sets out the legal framework within which the United National Independence Party emerged and operates to-day. Chapter IV examines some changes in the Constitution of Zambia that brought about the central role of the United National Independence Party. The Chapter looks also at the mode the Party is organized and its top leadership is chosen.

Chapter V examines the role of the United National Independence Party in public administration and Chapter VI looks at Public Law under a One-Party system. The relationship between the Party and Parliament is considered in Chapter VII. The relationship between the Party and Local Authorities is considered in Chapter VIII.

The relationship between the United National Independence Party and the labour movement (trade unions) is considered in Chapter IX. The role of the Party in the formulation and implementation of foreign policy is considered in Chapter X. Chapter XI contains the Conclusion.

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In carrying out my field work, I am grateful for the assistance I received from the Registrar of the High Court, the Director of the National Archives of Zambia, and, the Librarian of UNIP's Library and Archives, Lusaka. I am also grateful for the assistance I received from the Librarian of the Bodleian Library, Rhodes House, Oxford, of the Institute of Commonwealth Studies, of the Institute of Advanced Legal Studies and of the School of Oriental and African Studies, London.

My sincere appreciation to Dr Simon Coldham and Dr Slinn and the Director of the Institute of Advanced Legal Studies for selecting me as one of five Ph.D overseas students from the University of London Schools and Collèges, to share in the presentation on The Law Overseas, made in the presence of Her Royal Highness, the Princess Royal, the Chancellor of the University of London, on the occasion of the celebration of the 40th Anniversary on the founding of the Institute of Advanced Legal Studies of the University of London, held at the Institute's Charles Clore House, London, on Tuesday, 23rd October, 1986.

My appreciation goes also to Mr Mathias Mainza Chona, the former Vice-President, Prime Minister and Attorney-General of Zambia, former Secretary-General of UNIP, and, Chairman of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, 1972, for answering my questions on the recent constitutional developments in Zambia. His Answers appear as Appendix 'A' to this Study. I am also grateful to Mr George Lavu Mulimba, a member of the aforementioned National Commission, a former Mayor of Lusaka and a former Minister of State for Decentralisation in the Government of Zambia, and a Member of the Central Committee, for answering my questions on the recent changes in the local administration system in Zambia. His Answers appear as Appendix 'B' to this Study.

This study owes much of its enrichment to the work of many commentators and scholars whose work has been cited. To all of them, as well as the members of Commissions of inquiries whose observations and recommendations have shaped the constitutional development of Zambia and other countries cited in this Study, I express my profound and sincere appreciation.

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ABBREVIATIONS.A.

<u>AA</u>	<u>African Affairs</u> (Journal of the Royal African Society)
<u>ABDULJ</u>	<u>Ahmadu Bello University Law Journal</u>
AC	Court of Appeal
AMU	Amalgamated Mineworkers' Union (NR)
ANDU	African National Democratic Union (NR)
ANFM	African National Freedom Movement (NR)
ANIP	African National Independence Party (NR)
ARC	African Representative Council
<u>ASAL</u>	<u>Annual Survey of African Law</u> (UK)
ASP	Afro-Shirazi Party (Zanzibar)
AUC	African United Congress

B.

BCP	Botswana Congress Party
BFSP	British and Foreign Papers (UK)
BNP	Barotse National Party (NR)
BSAC	British South Africa Company

C.

c.	Chapter (of Laws, UK)
Cap.	Chapter (of Laws)
CCM	Chama Cha Mapinduzi (Tanzania)
<u>CLB</u>	<u>Commonwealth Law Bulletin</u>
CO	Colonial Office (UK)
CPP	Convention People's Party (Ghana) and (NR)

D.

DG	District Governor (Zambia)
DPP	Director of Public Prosecutions

E.

<u>EALJ</u>	<u>East African Law Journal</u>
EACA	East Africa Court of Appeal
(Ed.)	Editor
(ed.)	edition

ABBREVIATIONS.F.

FRELIMO Frente de Liberacao de Mozambique
 (Front for the Liberation of Mozambique)

G.

GLJ Ghana Law Journal
 GLR Ghana Law Report

H.

H.M. His or Her Majesty (UK)
 HMSO H.M.'s Stationery Office

I.

IRC Industrial Relations Court (Zambia)
 ICJ International Court of Justice

J.

JAA Journal of African Administration
JAL Journal of African Law
JCCP Journal of Commonwealth and Comperative Politics
JICH Journal of Imperial and Commonwealth History
JMAS Journal of Modern African Studies

K.

KANU Kenya African National Union
 K.B. Kings Bench (Law Report, UK)

L.

Legco Legislative Council (NR)

M.

MCC Member of the Central Committee (UNIP)
 MCP Malawi Congress Party
 MPLA-WP Movimento Popular da Liberacao de Angola-Partido Trabalho
 (Popular Movement for the Liberation of Angola-Workers'
 Party)
 MUZ Mineworkers' Union of Zambia

ABBREVIATIONS.N.

NANC	Nyasaland African National Congress
NAZ-L	National Archives of Zambia - Lusaka
<u>NCEOPPDZ</u>	<u>National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, Report, 1972</u>
<u>NCEOPPDZ-SRAG</u>	<u>National Commission on the Establishment of a One-Party Participatory Democracy in Zambia - Summary of Recommendations Accepted by Government, 1972</u>
<u>NLJ</u>	<u>Nigerian Law Journal</u>
NR	Northern Rhodesia
NRAC	Northern Rhodesia African Congress
NRAMU	Northern Rhodesia African Mineworkers' Union
NRANC	Northern Rhodesia African National Congress
NR LR	Northern Rhodesia Law Report
NRMD	National Revolutionary Movement for Development (Rwanda)
NRTUC	Northern Rhodesia Trade Union Congress
NTUC	Nyasaland Trade Union Congress
NPP	National Progressive Party (NR)
NRLP	Northern Rhodesia Labour Party

O.

OAU	Organization of African Unity
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P.

<u>PA</u>	<u>Parliamentary Association</u> (Journal of the Hansard Society)
PAFMESCA	Pan-African Movement for East, Central and Southern Africa
PAIGC	<u>Le Partio Africano da Independencia da Guinea a Cape Verde</u> (The African Party for the Independence of Guinea and Cape Verde)
PCC	<u>Partio Comunista de Cuba</u> (Cuba)
PCT	<u>Parti Congolais du Travail</u> (Congo)
<u>PL</u>	<u>Public Law</u>
PPS	Provincial Political Secretary (UNIP)

Q.

QBD	Queen's Bench Division (Law Report, UK)
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R.

Reg.	Regulation
R & N LR	Rhodesia and Nyasaland Law Report
RTUC	Reformed Trade Union Congress (NR)

ABBREVIATIONS.S.

SADCC	Southern African Development Coordinating Conference
S.I.	Statutory Instrument
SR	Southern Rhodesia
SRANC	Southern Rhodesia African National Congress
SRLR	Southern Rhodesia Law Report
SWAPO	South West Africa People's Organization (Namibia)

T.

TANU	Tanganyika African National Union
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U.

<u>UGLJ</u>	<u>University of Ghana Law Journal</u>
UFP	United Federal Party (Central Africa)
UK	United Kingdom
UMU	United Mineworkers' Union (NR)
UNFP	United National Freedom Party (NR)
UNIP	United National Independence Party (Zambia)
UNITA	<u>Uniao Nacional para a Independencia Totale de Angola</u> (National Union for the Total Independence of Angola)
UP	United Party (Zambia)
UPC	Uganda People's Congress
UPNP	Union Party for National Progress (Burundi)
UPP	United Progressive Party (Zambia)

Z.

ZANC	Zambia African National Congress
ZANDU	Zambia National Democratic Union
ZANU-PF	Zimbabwe African National Union-Patriotic Front
ZAPU	Zimbabwe African People's Union
ZCCM	Zambia Consolidated Copper Mines Limited
ZCTU	Zambia Congress of Trade Unions
ZIMCO	Zambia Industrial and Mining Corporation Limited
ZIRCR	Zambia Industrial Relations Court Report
<u>ZLJ</u>	<u>Zambia Law Journal</u>
ZMU	Zambia Mineworkers' Union
ZR	Zambia Law Report
ZR HP	Zambia Law Report (unreported), High Court, Lusaka
ZR HN	Zambia Law Report (unreported), High Court, Ndola

ZAMBIA (FORMERLY NORTHERN RHODESIA) : COUNTRY PROFILE.NR: BRITISH GOVERNORS:

1. Sir Herbert James Stanley	1924 - 1927
2. Sir James Crawford Maxwell	1927 - 1932
3. Sir Ronald Storrs	1932 - 1934
4. Sir Herbert Winthrop Young	1934 - 1938
5. Sir John Alexander Maybin	1938 - 1941
6. Sir Eubule John Waddington	1941 - 1947
7. Sir Gilbert Rennie	1947 - 1954
8. Sir Arthur Edward Trevor Benson	1954 - 1959
9. Sir Evelyn David Hone	1959 - 1964

ZAMBIA:

<u>Date of Independence</u>	24th October, 1964
<u>President</u>	Kenneth David Kaunda (1964 -)
<u>Geography</u>	752,618 kilometers, bordering Angola, Botswana, Malawi, Mozambique, Namibia, Tanzania, Zaire and Zimbabwe.
<u>Population</u>	2,785,000 male and 2,894,000 female; 3.4 per cent birth-rate; 43 per cent live in urban areas.
<u>Languages</u>	Official, English; officially recognized: Bemba, Chichewa, Kaonde, Lunda, Luvale, Silozi and Tonga.
<u>Economy</u>	copper, zinc, lead, cobalt, sugar, maize, groundnuts, cotton.
<u>Education</u>	Enrolment: 1,041,000 (primary), 94,595 (secondary), 5,335 (technical), 4,445 (teacher-training) and 3,425 (university). ¹
<u>Form of Government</u>	One-Party, from 13th December, 1972.
<u>Political Party</u>	UNIP, founded 2nd August, 1959.

1. Zambia: Zambia: Country Profile; Central Statistical Office, Lusaka, 1984, figures compiled from pp. 1, 3, 10, 31 and 83.

CHAPTER I.INTRODUCTION.

THIS STUDY sets out to consider the legal aspects of the central role of UNIP in Zambia's One-Party system. It sets out to analyse, from a legal stand point, some aspects of the role of the Party. The main focus of the study is to demonstrate at least three factors on the role of UNIP, namely that

- (a) Zambia is governed through law and through institutions one of which is UNIP, but that there is ambiguity in the law on the legal capacity of the Party and that has at times adversely affected the role of the Party or the interests of persons who felt injured by some acts of functionaries of the Party;
- (b) notwithstanding its ambiguous legal capacity, UNIP has utilized the law in asserting its authority; and
- (c) although UNIP operates within the framework of its own Constitution in particular and the Constitution of Zambia in general, its role is shaped and dominated by the President of the Party and the Republic.

The study is, therefore, an analysis of the role of UNIP in the government of Zambia. It provides a practical guide on the role of the Party in the constitution of its own organs and election of leadership and the Party's relationship with the Executive, the Legislature, the Judiciary and other public institutions. Some outstanding features of UNIP need to be stated, for instance, it is not a 'chief's party', that is, like the Kabaka Yekka in Uganda, one formed to serve a chief's personal political interests; in fact UNIP organizers were sometimes goaled by chiefs.¹

1. Chitambala v. The Queen (1957) NR LR Vol. 1V, 29. Chitambala was an organizer of the NRANC and later of UNIP and he was goaled by a Chief for calling a political meeting without the Chief's permission; infra, p. 98.

UNIP has had no link with a religious sect. The Lumpa Church of the self-proclaimed prophetess Alice Lenshina Mulenga,¹ which was involved in violent clashes with the security forces on the eve of Zambia's Independence, was suspected to have had acted in league with certain political organizations, but the commission of inquiry into the disturbances found that "there was no direct evidence of any link between the Church and any political party."² UNIP is not a 'tribal party', that is, one formed exclusively to serve the interests of a particular ethnic group in the community. The Action Group in the former Western Region of Nigeria, was described as a 'tribal party' in that it was formed under the nucleus of the Egbe Omo Oduduwa which was an organization founded to 'unite the various clans and tribes of Yorubaland',³ although it was also described as a cultural organization.⁴

Although African political organizations in NR waged a 'freedom struggle' against British colonial rule,⁵ that did not lead to an armed struggle and consequently, UNIP is not a 'soldiers' party'. The description 'soldiers' party' could be applied to at least two types of organization, first, a political party formed by a former guerrilla movement after achieving independence such as FRELIMO, the MPLA-WP and PAIGC, and, second, a political organization formed by soldiers following the over-throw of a civilian administration, for

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1. Zambia: on her detention and application for habeas corpus see: In re Alice Lenshina Mulenga (1969) ZR 243.
 2. Report of the Commission of Inquiry into the Former Lumpa Church, 1965, p. 7; Government Printer, Lusaka. (Chairman: Mr Justice Whelan).
 3. Hodgkin, T., African Political Parties; Penguin Books, 1961, p. 20.
 4. Achike, O., Military Law and Military Rule in Nigeria, Fourth Dimension, Unugu, 1978, p. 96
 5. Infra, p. 73.

instance, the MPR, formed by General (now Marshal) Mobutu Sese Seko Kuku wa Banga of Zaire¹ and the Workers' Party of Ethiopia, formed by Colonel Mangistu Haile Mariam.² UNIP is not a 'transplant party' similar to those political parties modelled mostly on the UK's political parties formed in the British dominions such as Australia, Canada and New Zealand. These political organizations were to a great extent based on the British political system, traditions, class distinctions and freedom of organization, assembly and expression. Although UNIP was, from its inception, modelled on the European settlers' political parties, e.g. its organization being based on a written constitution and elected leaders, it was a 'mass organization' devoid of class distinctions; hence the Party's claim that: "The Party is the militant organization of revolutionary peasants, workers, students and progressive intellectuals and shall exercise supreme authority over all State organs".³ Membership in UNIP is open to all Zambians.⁴

The Origins of Political Parties in the UK.

The European political parties in NR were modelled on the UK political parties. The origins of political parties in the UK are traceable in the relationship between the monarchy, the aristocracy and the common people. Although by the 1680's the tag 'Whig' had acquired a national currency in describing the people who supported the respective influential personalities, political organization was in the main carried out by and around powerful aristocratic families and personalities who wrestled

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| 1. Zaire: | MPR was founded on 20th May, 1967: <u>Histoire du Mouvement de la Revolution</u> ; Forcad Mikanda, Kinshasa, 1971, p. 1. |
| 2. Ethiopia: | Ethiopia Workers' Party officially launched on the 7th September, 1984. |
| 3. UNIP: | Constitution, 1988, Art. 3. UNIP has had a written Constitution since 2nd August, 1959. In this study reference is mainly to the Constitution adopted by the 7th General Conference (16th August, 1973), the 8th General Conference (9th September, 1978), the 9th General Conference (22nd August, 1983) and the 10th Party Congress (21st August, 1988) which also converted General Conference into Party Congress. |
| 4. | <u>Infra</u> , p. 380 <u>et seq.</u> |

ministerial posts from each other and sought favourable relationship with the Crown. By the beginning of the 1700's there had developed a Whig and Tory party, each held together not only by a set of political and religious attitudes, but also by ambition to hold office and a rudimentary party organization based on territorial power of the aristocracy and the gentry¹ or as they have been referred to as 'territorial magnates'.² It has, however, been contended that the old Whig leaders had no conception of a "party government unconnected with the King, and hence of a constitutional Parliamentary opposition."³ The Monarchy on the other hand, resisted recognition of the House of Commons as divided into political parties, or, to regard a 'Ministry' as a 'party ministry' or government. After the defeat of Lord North in 1782 by Lord Rockingham, it became clear that a constitutional point had been made when a group of men identified as a party, with a leadership, political policies and programmes, had ousted a ministry and itself assumed office. Hence-forth, the monarchy had to be accustomed to a party government.

The reform legislation of 1832⁴ gave the vote to additional persons and encouraged the growth of political awareness and political organization which initially took the form of voter registration associations. A link between the Parliamentary and provincial leadership was provided by political clubs: the Carlton Club was founded by the Tory party in 1831 and the Reform Club by the Whig party in 1836. In 1861 the Liberal Party (the Whig party) in Parliament set up the Liberal Registration Association and in 1870 the Tory Party set up the Conservative Central Office with its leader, Benjamin Disraeli

1. O'Gorman, F., The Rise of Party in England: The Rockingham Whigs 1760-80; George Allen & Unwin, 1975, p. 34.

2. Keir, D.L., The Constitutional History of Modern Britain Since 1485; Adam Charles Black, 9th ed. 1969, p. 285.

3. O'Gorman, F., loc. cit., p. 51.

4. UK: Representation of the People Acts, 1832, 2 & 3 Will. 4, c. 45, c. 65 and c. 88.

(later Lord Beaconsfield) contending that the Conservative party was the national party of England.¹ He propounded three main principles of the party: "the maintenance of our institutions, the preservation of our empire, and, the improvement of the conditions of the people."²

At the time of the Berlin Conference on the Partition of Africa in 1885, the newly enfranchised voters in the UK had elected a Liberal party government into office and was in office when the BSAC was granted its Charter in 1889.³ In 1893 the Independent Labour party was launched by James Keir Hardie to unite for the common action the various socialist organizations in England. A written constitution was adopted spelling out the aims and objectives of the organization: collective ownership and control of the means of production, distribution and exchange. The method by which these were to be realised was through representation of the people in the House of Commons, by men and women in favour of the objectives.

Trade unions which had in 1864 formed the TUC had, since 1874 secured representation in the House of Commons through the Liberal Party. In 1888 a Labour Electoral Association was formed with the aim of securing some representation of workers in Parliament. In 1899 a Labour Representative Committee was formed at a congress of the Independent Labour Party, the TUC and co-operatives. In 1906 the Committee changed its name to the Labour Party.⁴ Thus, by 1906 the present multi-party system had emerged; each party with its own leadership, policies, programme and membership (except for the

1. Holland, F. (Ed.) May's Constitutional History of England 1860-1911; Vol. III, Longman, 1912, p. 67.

2. ibid. p. 80, quoting Keibel's Selected Speeches of Lord Beaconsfield, p. 488.

3. UK: The BSAC was incorporated on 29th October, 1889: BFSP, 1889, Vol. LXXXI

4. Neumann, S., Modern Political Parties: Approaches to Competitive Politics; Chicago UP, 1967, p. 35.

Conservative Party which had no enrolled membership except through the constituencies. Individual membership of the National Union of the Conservative Association, as the whole party is called, was introduced in 1975.¹⁾ The Labour and Liberal parties adopted a written constitution in 1906 and 1952, respectively. Their formal organization is based on party membership and a Parliamentary party.²⁾ The Liberal Party disappeared in 1988 through amalgamation with other political organizations.

Freedom of Association and Assembly.

Since 1918 the UK has had a multi-party system dominated by the Conservative and Labour parties. The party system has been influenced by two main factors, first, an electoral system based on single-member Parliamentary constituencies and majority voting system, 'first past the post',³⁾ favours a two-party system and penalizes the third and subsequent parties, and, second, although a homogeneous society, the UK has class distinctions; hence, social class favours and develops class-based political system. These two factors were important in the importation of political party system from the UK into, for e.g. an African society. In addition to considering whether the UK party system was exportable to or emulatable in an African society, it should be mentioned that political parties in the UK developed under circumstances where there was freedom of association and assembly; which has resulted with the political party's legal capacity remaining unsettled. According to Walter Bagehot, nobody would understand political parties' status or "Parliamentary government who fancies it an easy

1. Conservative and Unionist Central Office v. Burrell (Inspector of Taxes) /1982/ 1 WLR 522, at p. 526.

2. For a detailed analysis of UK political parties, see: Chrimes, S.B., "The Evolution of Parties and Party System", PA, 1951-52, Vol. V, pp. 1-120.

3. de Smith, S.A., Constitutional and Administrative Law; Fifth ed., Penguin Books, 1985, p. 260.

thing, a natural thing not needing explanation. You have not a perception of the first elements in this matter till you know that government by a club is a standing wonder".¹ In the UK political parties are not as such recognised by the law except indirectly, for instance, by providing salaries to the Prime Minister, members of the Cabinet and the Leader of the Opposition.² Parliament has had opportunity to legislate on the status of political parties, for instance when it enacted the Parliamentary Elections and Corrupt Practices Act, 1879³ and the numerous Representation of the People Acts, 1832 to 1948. It could be argued that such legislation dealt with the prohibition of corrupt practices of parliamentary candidates and/or their agents and not with political parties, which, however, cannot commit an electoral offence. If legislators saw it fit to pass legislation on companies and their status and liabilities of their directors and employees, it is feasible that legislation could have been enacted on the status of political parties. Political leaders are probably against legal formalisation of political activity and being out-ward-looking, they might have felt that legislation was necessary only in the control of 'mischief' in society and the pursuit of politics was not viewed as such to require legal control.

This want of a definite law on the status of political organization was a second element in the question posed earlier whether the UK political party system was exportable to an African country. A study of the political organizations' origins in the UK gives the impression that the task in the constitutional evolution was to settle or sort out the relations among the principal institutions, mainly the monarchy, the aristocracy, the Commons and the Courts of

1. Bagehot, W., The English Constitution; Fontana, 1867, Tenth Impression, 1973, p. 156; emphasis supplied.

2. UK: Consolidated Fund (Ministers of the Crown) Act, 1937, 1 Edw. 8/1 Geo. 6. c. 38 sec. 5(1), now Ministerial and Other Salaries Act, 1972, c. 3, sec. 1(5).

3. 42 & 43 Vic. c. 75.

Law. Political parties did not and still do not feature among these important 'institutions'.

Political Organization in the Commonwealth.

There was a successful exportation from the UK of the British multi-party system and ideas of a parliamentary democracy to the older Commonwealth countries such as Australia, Canada and New Zealand. There are two possible explanations for that; first, the people who migrated from the UK and settled in these territories were nurtured within the British traditions including the freedom of assembly, organization and expression, and, secondly, the Imperial Power allowed the settlers to establish their system of government on the British model with all the British trappings including the British monarchy being also the Head of State of the settled territory and a political party system. Hence, in Australia the first political party to appear was the Labour Party in the 1850's which took office in 1891, the year that the first political party in New Zealand, the Liberal Party, also took office. In Canada the political parties resembled more the political parties in the United States of America than those of the UK; "they are great holding companies, incorporating conflicting interests and maintaining their cohesion through the struggle for political power rather than through principle or class interests."¹ The first political party there, the Liberal-Conservative, took office in 1867.

The emergence of the 'political party' in British-ruled African territories could be considered in respect to the period before and after the advent of colonial rule. In explaining African concepts of government before the advent of colonial rule, African societies have been divided into two main groups. First, societies which had a centralized authority

1. Neumann, S., op. cit., p. 13.

well-defined administrative machinery and established judicial institutions. Such centralized authorities were referred to as kingly or chiefly systems, for instance, the Barotse, the Baganda and Tswana and were ruled directly by the King (or Chief) in Council. The second group consisted of those societies in which authority was dispersed through a number of counter-balancing segments: these were referred to as chiefless societies, ruled through councils of elders usually chosen by virtue of their being titular heads of their families.

Although it has been said that "the African concept of government is not essentially dissimilar from the European, it is hardly to be wondered at that the emergence of African States in contemporary world politics is proving so successful and exciting,"¹ there is no evidence that African political systems either under the so-called chiefly or chiefless rule were based on European political parties, the vote, regular elections or elected representative institutions. Instead, these were conservative systems, limited government with restricted public debate. To-day's political party, the vote, periodic elections (where they exist) and elected representative bodies, were introduced by European colonialism, laws and practices and were planted in an African environment.

In West Africa political organization appeared early but within the colonial context, for instance, in Ghana, then the Gold Coast, the Fanti Confederation was formed in 1868 followed by the Aborigines' Rights Protection Society in 1897, the Congress of British West Africa in 1918 and the United Gold Coast Convention.² Kwame Nkrumah's CPP,³ which became a model of a number of African political organization, was a splinter group from the United Gold Coast Convention. In Central Africa, that is

1. Elias, T.O., Government and Politics in Africa; Asia Publishing House, London, 1961, p. 22.

2. For a detailed analysis of political parties in French West Africa, see: Morgenthau, R.S., Political Parties in French West Africa; Clarendon Press, Oxford, 1964.

3. Founded in February, 1949.

Malawi, Zimbabwe and Zambia, the origins of political organization are traceable in the incorporation of the BSAC and its activities in southern Africa. The creation of the Union of South Africa and the establishment of a Senate of thirtytwo members and a House of Assembly of onehundred and twentyone members who had to be, and who were to be elected by, persons described as 'British subjects of European descent',¹ stimulated political organization among white settlers in the Union in particular, and, sub-Sahara Africa, in general. The settlers' political mobilization triggered African political organization to protect their indigenous rights. The former President of Tanzania's premise of the origins of African political parties, was that

The European and American parties came into being as the result of existing social and economic divisions - the second party being formed to challenge the monopoly of power by some aristocratic or capitalist group. Our parties had a different origin. They were not formed to challenge any ruling group of our own people; they were formed to challenge foreigners who ruled over us. They were, therefore, not political 'parties' - i.e. factions - but nationalist movements. And from the outset they represented the interests and aspirations of the whole nation.²

African political organization came into being as a result of social and economic pressures exerted by colonial rule and the division between the white settlers and the natives. African political parties were 'political parties' in that they were formed to assume political power from the colonial rulers, and, to resist political domination of the natives by the white settlers. But these were 'European' form of political organization imported into the African society. Max Webber's view of the evolution of political parties was that it followed three

1. UK: South Africa Act, 1909, 9 Edw. 7, c. 9, secs. 26(d) and 44(c).

2. Nyerere, J.K., "Democracy and the party system", Tanganyika Standard; January, 16-18, 1963.

stages; first when political parties were pure followings of the aristocracy, changing their allegiance as the great noble families which led them, changed theirs. The second stage was the parties of nobles. These arose with the rising power of the bourgeois and consisted of formal local associations of the propertied and cultural circles, held together not by a party machine, but members of the party with seats in the legislature. The third stage was of formally organized national parties whose power did not rest with the parliamentary party or formal local associations or assemblies, but by party bureaucrats, organizers and especially a party leader who had shown the capacity to win support of a mass electorate. This stage Webber described as 'plebiscitarian democracy'.¹

The emergence of African political organization in Zambia began at the plebiscitarian stage in that it was aimed at mass mobilization against the prevailing political system. The traditional African systems of government had no notion of 'political party' either as an instrument of government or opposition. Although the struggle for self-government which prompted African political organization was wedged as a 'national struggle', no political party emerged that was wholly identified with the 'nation'. They remained political movements and could be included in the definition of 'political party'.

Definitions of 'Political Party'.

Definitions are useful in the delimitation of the subject being studied. There is no general or standard definition of 'political party'. Definitions of 'political party' are, therefore, legion. It has been said that to be a 'party' to something means identification with one group and a differentiation from another or other groups. In that sense,

1. Neumann, S., op. cit., quoting Max Webber.

every political party is a group separated from another or other groups: "A one-party system (le parte unique) is a contradiction in itself. Only the existence of at least one other competitive group makes a political system real."¹ Although this is description of a political system and not a definition of a political party, it does shed some light on the role of political parties - competing with each other for political power. A rather detailed definition of a political party is one in which the essential elements are continuity in organization, regularized relationship between local and national units, determination of the leaders to capture and hold power alone or in coalition with others and membership.²

For the purposes of this study, the following is adopted as the appropriate definition of a 'political party', viz

Political parties are associations formally organized with the explicit and declared purpose of acquiring and/or maintaining legal control, either singly or in coalition or electoral competition, with other similar associations, over the personnel and the policy of the government of an actual or prospective state.³

One of the important elements in this definition is that which affords the status of 'political party' to political organizations formed to wrestle political power from a colonial power in the pursuit of founding a future sovereign state. The African political movements that fought for self-government would qualify as 'political parties' under this definition. The definition also accords the status of a 'political party' to the only one political party allowed to operate under a One-Party system (le parte unique). During colonial rule in NR because of electoral restrictions, African political organizations did

1. Neumann, S., op. cit., p. 359 (Brackets supplied).

2. LaPalombara, J., and Weiner, M., Political Parties and Political Development; Princeton, 1966, p. 6.

3. Coleman, J.S. and Rosberg, C.G., Political Parties and National Integration in Tropical Africa; Berkeley UP, 1966, p. 2.

not participate in elections until 1959. The above definition includes such organizations as 'political parties' committed to assumption of political control of what was then a prospective sovereign state.

Although political commentators have produced a legion of definitions of 'political party',¹ the law has been lacking in this respect. In most African territories administered by the British, the administrators confronted by militant nationalist political organizations demanding self-government, introduced legislation² aimed at not giving the organizations some legal status, but to provide the administrators with legal powers to deal with the activities of the organizations. The legislation did not define 'political parties' but 'societies', to mean associations of individuals and not companies, cooperative societies, or trade unions. This definition found its way into some Constitutions, for instance, that of Nigeria of 1978 which provided that 'association' means a body of persons corporate or incorporate "who agree together for any common purpose, and includes an association formed for any ethnic, social, cultural, occupational or religious purposes", and 'political party' meant any "association whose activities include canvassing for votes in support of a candidate for election to the office of President membership of a legislative house or local government council".³ There was, however, a divergence between what the law defined

1. Lawson, K., The Comparative Study of Political Parties, St. Martin's Press, N.Y., 1976, p. 3; Price, J.H., Political Institutions of West Africa, Hutchinson, 1978, p. 14

2. Tanganyika: Societies Ordinance, 1954, No. 11, Cap. 337 and NR, Societies Ordinance, 1955, No. 43, Cap. 105, sec. 2.

3. Nigeria: Constitution of Nigeria Act, 1978, No. 25, Art. 209. Article 201 required that before a political party engaged in any activities it should register with the Federal Electoral Commission. On the implementation of these provisions see: Nwanko, G.O., "Political Parties and their Role in the Electoral Process: The Nigerian Experiment with the Presidential System of Government", Journal of Constitutional and Parliamentary Studies, Vol. XVII, Nos. 3 and 4, July-December, 1983, p. 4.

as 'political parties' and other organizations that also participated in politics, for instance, affluent members of various communities, 'home town'-based social clubs, youth and women organizations as well as the town unions and age-grade associations could sponsor candidates of their choice for nomination by parties which they perceived as likely to win most of the votes of people in their various constituencies.¹ The problem was that definition and/or status of political party was arbitrarily determined by registration.

The One-Party Constitutions adopted by some African States do not define the political party preserved by the system; that is left to be regulated by (former colonial) legislation and the common law. At common law a 'political party' has recently been described as

an association between two or more persons bound together for one or more purposes, not being business purposes, by mutual undertaking each having mutual duties and obligations, and was an organisation which had rules identifying where its control rested and the terms on which it could be joined or left; that the bond of union between the members of such association had to be contractual and the agreement which brought the contract about should have been made on some identifiable occasion or in some identifiable circumstances.²

This definition accords the status of 'political party' to a political organization under colonial rule or in an independent state, or under a multi-party or one-party system. The view that one-party states in Africa have "become in many places no-party state",³ is a contradiction in terms. The point purported to be made is however, discernible, namely that the integration of the party and government and state institutions might result in the withering away of the party.

1. Nwanko, G.O., op. cit., p. 5.

2. Conservative and Unionist Central Office v. Burrell (Inspector of Taxes) /1982/ 1 WLR 522, per Lawton LJ at p. 525.

3. Wallerstein, I., "The Decline of the Party in Single Party African States" in LaPalombara, J., and Weiner, M., loc. cit., p. 214, supra. p. 29.

Some writers have, on the other hand, contended that a state ruled by a 'communist party' (often a one-party state), is a 'police state' or a 'party state'.¹ Except in those situations in which all political parties or organizations have been proscribed and political activity prohibited by law, does a state become or could be described as a 'non-party state'. A One-Party system retains one political party which functions as an entity on its own separate from the Government. This study, therefore, is a study of the legal aspects of a political party's status and role in a One-Party State.

CONCLUSION.

The origins and development of political parties in the UK show a steady progressive shift in the political leadership from the aristocrats to the common people and from a non-political party system to a multi-party system. Political organization was and still is based on the laissez-faire principle - uninhibited freedom of expression, assembly and association, of forming and belonging to political parties etc. - which was imported to the older Commonwealth countries such as Australia, Canada and New Zealand. In these countries political organization emerged unhampered by legal constraints. In African countries, the position was different. The African traditional system of government and political organization revolved around the institution of chieftaincy which did not develop an institution known as 'political party' either as an instrument of government or opposition to government. On the other hand, colonial administrators did not allow the policy of laissez faire to apply to African political organization. Accordingly, they introduced legislation to control political organization in general and African parties in particular. However, the politically organized

1. Loeber, D.A. (Ed.), Ruling Communist Parties and Their Status Under Law; Martinus Nijhoff Publishers, Dordrecht, 1986, a number of such writers cited at p. (xviii).

masses emerged supreme; their 'party' replacing both the traditional rule and colonial administration as the machinery of government. The argument advanced in justifying a one-party system of government in some African countries that that system was more consonant with the African traditional rule than a form of government based on a two or multi-party system, is used to conceal the political party's successful coup d'etat of traditional rule. There are no similarities between the two systems of government. The political party is a European political institution whose origins, status and role are not determined by any African customary rules or customs, but by the common law and statutory rules.¹

It is not easy to understand the system of government of any country without some knowledge of the country's history. Much of the explanations of any political system depend on an explanation of the past or how the past affects the present. In order to facilitate the understanding of the role of UNIP to-day, the following Chapter looks at the emergence of institutions of government and political party system before and after UNIP was formed. During the colonial era in NR political parties had no clear legal status. The reason for that was not hard to see. In the metropolitan country (UK) whose laws and political ideals the settlers in NR emulated, the Crown, government departments, local authorities and public corporations had legal personality. Political parties had neither legal personality nor capacity: they were taken for granted. In the post-independence era, the political party in Zambia, although not yet dressed in full legal dress, has assumed an important role. This important role, however, cannot be understood except in the context in which the Party emerged, assumed political power and has changed the Constitution of Zambia to become the supreme institution of the government of the Republic.

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Infra, p. 90.

CHAPTER II.

THE CONSTITUTIONAL DEVELOPMENT AND EMERGENCE OF POLITICAL PARTIES IN NR (ZAMBIA) FROM 1900 to 1964.

From Colonial Non-Political Party System to an Interlude of a Multi-Party System.

Introduction.

The Constitutional development of Zambia, vis-a-vis the evolution of its laws, governmental institutions and political system, could be divided, allowing for some over-laps, into the following five major periods; viz

- (a) the non-political party system, 1890 to 1918; that is the period during which the regions which later became NR and Zambia were being acquired, delimited and amalgamated under the administration of the BSAC;¹
- (b) the European-only political organization, 1918 to 1958; when quasi-political organizations and political parties participated in the election of members of the Advisory Council and Legco, though African political organization had also began during the period;
- (c) the European and African political organization, 1958 to 1968; when an interlude of multi-partism emerged and parties competed for seats in the Legco, Legislative Assembly and the National Assembly;
- (d) the African political parties only, from 1968 to 1972; when, following the demise of settler political parties, the political arena was left to African political parties only; and,

1. For a brief but comprehensive history of Zambia before this period, See: Langworthy, H.W., Zambia before 1890: Aspects of Pre-Colonial History; Longman, London, 1972.

- (e) the One-Party system, commencing 1972, and in operation at the time of writing (1989).

The constitutional development of Zambia progressed on precarious grounds and through difficult times due to the presence of plural societies comprising of Africans, white settlers and others. Territorial acquisitions and re-arrangements, governmental institutions and public organizations such as trade unions and political parties, emerged under colonial system of administration.¹ To some extent, UNIP's relationship or role in public administration² or with Parliament³ and the labour movement⁴ and the formation of its foreign policy⁵ are matters shaped more by the past than by the present. On the other hand, law in its nature is a product not of the present but of the past. The institutions of democracy - such as a representative political system, freedom of speech, assembly and association, the right to form and/or belong to a political party or parties - constituted important segments in the administration of Australia, Canada and New Zealand following their occupation by European settlers. In NR it was the absence of these institutions of democracy that shaped the origins of Zambia on one hand and of UNIP on the other hand. A study of the legal aspects of the role of UNIP in Zambia which omitted that history, would be incomplete. This Section, therefore, traces the territorial acquisition and re-arrangements that gave birth to NR, the evolution of its governmental institutions and laws and the African political mobilization that led to the emergence of UNIP. The British who migrated to North America and other places which they occupied as terra nullius, imported English law and form of governments into those lands and participated in elections as early as 1776 fought between the Federal Party ('the party of the wise, the rich and the well-born'), and the Republican Party ('the party of the small farmers'.)⁶ No such social classes emerged in NR.

1. Infra, p. 60

2. Infra, p. 186

3. Infra, p. 282

4. Infra, p. 404

5. Infra, p. 446

6. Commager, H.S. "American Political Parties"; PA, Vol. 111, 1950, p. 214.

With regard to conquered territories, the rules defining the application of English law and the form of government, were different since it was assumed that such territories had their own laws and forms of government. In the Protectorates, British 'protection' was said to have been based on capitulation, treaty, grant, usage, sufferance and other lawful means.¹ Most protectorates because they had established native population, could not be seized and occupied as terra nullius. Notwithstanding the presence of such population, such territories could not be governed wholly in accordance with the laws and customs of the natives, but through partly English law and partly native customary laws. But what might have been suitable in the English law or English Constitution was not necessarily expedient in the protectorates, and that was particularly the case when consideration was given to the circumstances of the tropical African dependencies. In most cases, however, there were more examples of deviation from English law and practices than with compliance particularly when it came to freedom of assembly, organization, expression and conscience.² The freedom of assembly and association which existed under the common law in England, was not automatically applied in NR. Native law and customs were devoid of any rules on freedom of association and assembly.

In effect the difference between colonies and protectorates was very little. The development of the Constitution and political systems in both colonies and protectorates were matters which fell within the ambit of English law and ideals. The following Sections look at the application of such laws and ideals in the delimitation of Zambia and the development of its Constitution and laws.

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1. UK: Preamble; Foreign Jurisdiction Act, 1890, 53 & 54 Vic. c. 30.
 2. See for instance, the views of Farewell L.J. in Rex. v. Crewe, ex parte Sekgome /1910/ 2 KB at p. 616 and Francis, J., in Petrus Johannes de Jager v. R. (1935) NR LR (1931-1937) 13, at p. 23.

Section 1. The Establishment of NR - 1900 to 1911.

The origins of NR were closely tied up with the activities of the BSAC in southern Africa. The Africa Order in Council, 1889,¹ made under the Foreign Jurisdiction Act, 1843,² provided, inter alia, that it was lawful for H.M. to hold, exercise and enjoy any power or jurisdiction which H.M. then had or might at any time thereafter have within any country or place out of H.M.'s dominions in the same and ample a manner as if H.M. had acquired such power or jurisdiction by cessation or conquest of territory. The Charter of the BSAC on the other hand, had provided that the principle field of the operations of the Company were the regions immediately to the north and west of the South African Republic and the west of the Portuguese dominions.³ In 1891 a Supplemental agreement was entered into between the Crown and the BSAC which extended the jurisdiction of the Company across the Zambezi River,⁴ (from which Zambia derives its name) to the regions which later became NR and Zambia.

(a) The BSAC and King Lewanika.

The BSAC's penetration into the region was through the Lozi kingdom of Lewanika who in 1889 had, through a French missionary, M. Coillard, written asking that H.M.'s protection be extended to his country. In 1890 armed with the Charter and British legislation, an agent of the BSAC, F.E. Lochner, who was an officer in the British Bechuanaland Border Police,⁵ entered into an agreement with Lewanika

1. UK: BFSP, 1889, Vol. LXXXI, p. 301.

2. now 1890, 53 & 54 Vic. c. 37.

3. Art. 1, BSAC Charter, 1889, as amended, 1891.

4. Hertslett, E., Map of Africa by Treaty; HMSO, 1894, Vol. 1, p. 272.

5. Williams, H.M., The Mining Law of Northern Rhodesia; BSAC, London, 1963, p. 23.

"and his heir Litia, his prime minister and all councillors and provincial representatives, to number about forty, affixed marks to a document giving the company the sole mineral and commercial rights over the whole of the ba-Rotse dominion."¹ As a consequence of the letter of 1889 and the agreement of 1890, the High Commissioner for South Africa was instructed by H.M.'s Government to inform Lewanika that he was under the protection of H.M.'s Government.² An agreement was later entered into on 24th November, 1894, between the CO (UK) and the BSAC by which the Company undertook the responsibility of administering the region which was under British sphere of influence north of the Zambezi river. The first British administrator reached the Lozi kingdom in October, 1897. He, however, had no administrative rights but he attended to some judicial matters.

The Lozi kingdom was based on a feudal system with the King as the head. Authority was concentrated at the centre and the executive had no separate existence from the legislature and the judiciary. The King and his councillors were bound by the law and had to act by regular procedures. Lozi law held that the king could be sued by his subjects in courts. To avoid this embarrassment, the king could only act through his councillors and attendants, who then became liable and might not plead his orders in defence.³ Although reference was and is still made to the office of the prime minister (the Ngambela), the system was not based on a political party system. It was a non-political party system operating under the King who was an absolute autocrat and supreme legislative authority. The Barotse

1. Hole, H.M., Passing of the Black King; Allen, 1932, p. 295.

2. UK: Memorandum of Barotseland, 1932, CO, Section III, pp. 4 and 5. See also Muyungo v. Induna Nalubutu (1960) R & N LR 677 at p. 682.

3. Gluckman, M., Judicial Process Among the Barotse of Northern Rhodesia; Manchester UP, 1955, p. 6.

Native system of government although well developed, did not evolve a political party system mainly because political power was vested in the King. Also the institution of political parties didnot exist and it was unknown.

In all, four concessional agreements were entered into between Lewanika and the agents of the BSAC: 17th October, 1900, the 8th March, 1905, the 23rd January, 1906 and the 11th August, 1909. These agreements did not affect the native system of government in Lewanika's kingdom. The main concession of 17th October, 1900, dealt mainly with economic matters such as manufacturing, mining, banking, currency, communications and judicial functions assigned to the BSAC. The judicial functions assigned to the BSAC were restricted to "adjudicate on all cases between whitemen and natives"¹ and these were matters pertaining to commercial activities of whitemen. Matters between and among natives were left to be dealt with by the King and his Council or courts.

Lewanika's territory to which these agreements applied was not precisely delimited and his jurisdiction was kept extended by white settlers who engaged Lewanika's impis (armies) in their drive into the interior of the region.² UNIP's leaders contended that these agreements were concerned with only Lewanika's traditional kingdom and not with NR as a whole.³ That stand is supported by the contents of the agreements themselves which referred to Lewanika's kingdom although they also referred to 'dependent territories'; a reference

1. Gluckman, M., op. cit., p. 2.

2. Val Gielgud and Anderson Papers, KTH/2 (188-1902), p. 2; NAZ-L.

3. Zambia: British South Africa Company's Claims to Mineral Royalties in Northern Rhodesia; Government Printer, Lusaka, 1964, p. 8.

probably intended to include neighbouring territories under Lewanika's subjugation. But those could not be bound by agreements to which they were not parties. Even Lewanika himself it is doubtful if the agreements, some of which were 'signed' by forty or so people, was bound by them. On the other hand, Lewanika did not understand the Queen's language in which the agreements were written. One of the early British administrators who was sent in 1922 by the Administrator of SR to go and draft 'simple laws and start some system of courts in North-Western Rhodesia', wrote of his encounter with Lewanika in a Bulawayo store,¹ as follows:-

The Chief was accompanied by his Prime Minister and a very fine pair of native gentlemen they were. He did not speak any English and his perfect manners - for they were perfect under all circumstances - were the result of his contact with Coillard of the Zambezi, the Protestant French Missionary who was head of the mission in Barotse country.²

The Lewanika-BSAC agreements were not treaties but commercial concessions which facilitated British colonial expansionism in central Africa. They paved the way for British rule in the region which was later confirmed by the provisions to the effect that any part of Africa north of the Zambezi River and under the protection of H.H.'s Government, should be included within the limits of the Order.³ That legislation signalled the beginning of the opening of the region to European settlement.⁴

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1. UNIP: Lewanika was at the time banished to SR by his people accused of mismanagement of public affairs: Programme (1979-1989) Transition from Capitalism to Socialism; 1978, p. 6.
 2. Henry Rangeley (1874-1953) Unpublished Memoirs; HM/20, p. 19, NAZ-L.
 3. UK: Barotzeland, North-Western Rhodesia Order in Council, 1899, sec. 4(1).
 4. North-Western
Rhodesia: Lands and Deeds Registry Proclamation, 1910, No. 57; Statute Law of North-Western, North-Eastern Rhodesia and Northern Rhodesia, 1971; Livingstone, 1917, to be referred to hereinafter simply at the Statute Law of NR, 1917; p. 71.

(b) Barotzeland-North-Western Rhodesia.

This Region was bounded by the river Zambezi, the Germany South West Africa, the Portuguese Possessions, the Congo Free State and the Kafukwe (Kafue) river, and the "territory within the limits of this Order shall be known as Barotzeland, North-Western Rhodesia."¹ The name 'Rhodesia' was derived from the name of one of the founders of the BSAC, Cecil John Rhodes. Although the Order joined Lewanika's 'Barotzeland' to 'North-Western Rhodesia', the former existed as a 'protectorate' separate from the latter. The BSAC agents had to enter into separate agreements with local chiefs to establish the Company's administration in North-Western Rhodesia.² Legislation for the Region was in the form of Proclamation issued by H.M.'s High Commissioner,³ who was stationed in South Africa. The legislation provided for the administration of justice, the raising of revenue through taxes, levies and custom duties and generally for the peace, order and good government of all the persons within the Region.

(c) North-Eastern Rhodesia.

This Region shared boundaries with the British Central Africa Protectorate (later Nyasaland Protectorate), the Germany East Africa, the Barotzeland-North-Western Rhodesia and the Congo Free State. The Region was acquired by the BSAC through concessions and agreements negotiated between 1890 and 1891 with local chiefs by Joseph Thompson and Alfred Sharpe, both employees of the Company. The BSAC administered the Region

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1. UK: Barotzeland, North-Western Rhodesia Order in Council, 1899, sec. 3; BFSP, 1899, Vol. 9, p. 1134.
 2. Makasa, K., Zambia's March to Political Freedom; Heinemann, Nairobi, Second ed. 1985; says that in 1953 the Africa Bureau in London collected 21 'treaties' between NR chiefs and agents of the BSAC or UK Government concluded during this period, p. 47.
 3. UK: Barotzeland, North-Western Rhodesia Order in Council, loc. cit., sec. 8.

in accordance with the provisions of the North-Eastern Rhodesia Order in Council, 1900¹ and its Charter. The Region was placed under an Administrator appointed by the BSAC who worked under H.M.'s Consul-General and the Commissioner for British Central Africa Protectorate. When the British Central Africa Protectorate was declared Nyasaland Protectorate in 1907,² and a Governor was appointed to administer the Protectorate, the North-Eastern Rhodesia was placed under the Governor.³ The Region remained placed under the Governor until in 1909 when the legislative functions of the Governor were taken over by the High Commissioner stationed in South Africa.⁴

The legislation for the Region was in the form of the Queen's Regulations (made by the Governor or High Commissioner) and Regulations (made by the Administrator) for the administration of justice, the raising of revenue and generally for the peace, order and good government of all persons within the Region.⁵ Such legislation could be disallowed by H.M. through a Secretary of State and upon such disallowance being published in the Gazette, the provisions so disallowed would cease to have effect but without prejudice to anything hitherto lawfully done thereunder.⁶ The North-Eastern Rhodesia Order in Council formed the basis of Zambia's constitutional development and three aspects of the form of administration established by the Order deserve brief mention.

(i) Land Occupation.

The Region's administration was entrusted to the BSAC. All land in the Region was wholly vested in the BSAC and the Company was obligated to assign to natives land sufficient for their occupation

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1. UK: North-Eastern Rhodesia Order in Council, 1900, Art. 4; BFSP, 1900, Vol. 92, p. 502; Statute Law of NR, 1917, p. 39.
 2. British Central Africa Order in Council, 1907, Art. 3; BFSP, Vol. 100, 1907, p. 94.
 3. North-Eastern Rhodesia Order in Council, 1907, Art. 3
 4. North-Eastern Rhodesia Order in Council, 1909, Art. 4
 5. North-Eastern Rhodesia Order in Council, 1900, Art. 17.
 6. ibid. Art. 17.

and agricultural and pastoral requirements.¹ Land was also vested in the BSAC in North-Western Rhodesia. In Barotseland - which was formally and separately declared a 'Protectorate' - land was not vested in the BSAC but remained vested in the Paramount Chief, except that the BSAC claimed mineral rights in the land in accordance with its agreements with Lewanika.

(ii) Maintenance of Law and Order.

For the maintenance of law and order, a military police force was formed under the direct control and authority of the High Commissioner.² A prisons system was constituted to handle a prison population which was on the increase as a result of the creation of new offences such as failure to report for work, pay taxes or remain in tribal areas. A court system was established with a High Court with full jurisdiction in civil and criminal matters.³ The law - civil and criminal - applied in the Courts was, and the procedure and practice to be observed and followed were, those obtaining before the Courts of Justice and Justices of the Peace in England.⁴ The Courts in the Region were required to apply English law and observe and follow English procedures and practices so far as local circumstances permitted. In addition to the imported English law, the locally made Queen's Regulations were also used in the maintenance of law and order and these were required to "respect any native laws and customs by which the civil relations of any native chief, tribe or population under Her Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of Her Majesty's power and jurisdiction."⁵

The BSAC did not enjoy sovereignty over the Regions but merely acted as the agent for the UK Government under whose protection and authority (its Charter) it operated. The administration was, therefore,

1. UK: North-Eastern Rhodesia Order in Council, 1900, Art. 40.
 2. ibid. Art. 20; infra, p. 392.
 3. ibid. Art. 21(1); infra, p. 90.
 4. ibid. Art. 21(2).
 5. ibid. Art. 17.

subject of control by the Imperial Power, H.M.'s Government in the UK.

(iii) Political Activities.

Although the Order of 1900 treated the Region more as a 'colony', e.g. by vesting all land in the BSAC, than as a 'protectorate', it did not give the settlers political power. The point of view of English settlers in 'colonies' was said to be that they could not settle abroad without carrying "the King and the duty of allegiance to the King, neither could they settle without carrying a Parliament and the right to assemble and vote taxes in that Parliament....."¹ Although the Order provided that the Company by resolution of its Board of Director could establish a Council to assist the Administrator composed of the Administrator, a senior judge, ex officio, and less than three other members appointed by the Company with the approval of a Secretary of State to hold office for three years,² it was premature for political party organization and/or establishment of an elected representative body.

(d) Amalgamation of Barotzeland-North Western and North-Eastern Rhodesia : Creation of NR.

The BSAC's view was that the two regions to be effectively and efficiently administered, should be amalgamated. A letter from Downing Street, the official residence of the British Prime Minister, to the Treasury, stated as follows:-

I am directed by Mr Secretary Harcourt to transmit for the information of the Lords Commissioner of the Treasury a draft Order in Council (Northern Rhodesia Order in Council, 1910) the purpose of which is the

1. Barker, Sir Ernest, "The Ideals of the Commonwealth", in Parliamentary Government in the Commonwealth; by Bailey, S.D. (Ed.), (1951) cited in "Government in the Colonies", PA, Vol. 6, 1952-53, p. 58.

2. UK: North-Eastern Rhodesia Order in Council, 1900, Art. 12; Statute Law of NR, 1917, p. 37.

amalgamation of the territories of North Western and North Eastern Rhodesia, a measure which has been asked for by the British South Africa Company on grounds of economy and efficiency for the past and which should in the opinion of Mr Harcourt now be carried out.¹

It is pertinent to notice that the letter did not make any mention of Barotseland; paradoxically although there is no record showing that the native chiefs and people of the two Regions were consulted on the amalgamation, there is a record that Lewanika was consulted on the amalgamation exercise. There is a letter from L.A. Wallace, the then Acting Administrator for the North-Western Rhodesia, Livingstone, to the Secretary of the BSAC in London, informing him of a meeting between King Lewanika and a Colonel Fair, representing the High Commissioner, at which the provisions of the draft Order, 1911, were explained to Lewanika, who was recorded to have objected to Clause 42 of the Order which purported to allow natives to buy, hold and sell land.² The NR Order in Council, 1911, delimited the new territory's borders to be with SR, Germany South West and East Africa, Portuguese East and West Africa, the Congo Free State, Nyasaland and Bechuanaland Protectorates, and

The Territory within the limits of this Order shall be known as Northern Rhodesia.³

The combined territory had a population of 818,529 Africans (379,055 in the former North-Eastern and 439,529 in the North-Western).⁴ Barotseland population figure was not given in 1911, but in 1938 it was estimated at 296,741 Africans.⁵ There were 1,487 Europeans (1,238 in the former North-Western and 259 in the North-Eastern, Rhodesia).

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1. NR: BSAC Administration Report; BS/2/264 (1907-1911)
Letter dated 14th November, 1910: NAZ-L.
 2. ibid. vide letter No. 32/3, 9th December, 1910, p. 32
 3. UK: The Northern Rhodesia Order in Council, 1911, Art. 4.
 4. NR: Memorandum by the Administrator on the Six Months of Northern Rhodesia, 1st April - 30th September, 1911; BS/2/134, p. 3; NAZ-L.
 5. Gluckman, M., Economy of the Central Barotse Plan; Rhodes-Livingstone Institute, Livingstone, 1941, p. 13.

The NR Order in Council, 1911, was made under the provisions of the Foreign Jurisdiction Act, 1890, whose main object was to grant H.M. jurisdiction over H.M.'s subjects for the time being resident in or resorting to foreign lands.¹ The Order did not introduce any new ideas except extending the provisions of the North-Eastern Rhodesia Order, 1900 to the combined territory. The legislation for the territory was to be made by the High Commissioner's Proclamations² published in the Gazette under his authority.³ The land remained vested in the BSAC which retained the universal right in all land assigned to natives and that if the Company wanted such land for purposes of mineral development or as sites for townships (that is European settlements) or for railways or other public works, the Administrator with the approval of the High Commissioner could order the natives to move.⁴ In Barotseland, however, land could not be alienated from the Paramount Chief and his people; though this restriction was confined to land covered in the BSAC-Lewanika agreement of 17th October, 1900 and 11th August, 1909.⁵

The provisions of Art. 12 of the North-Eastern Rhodesia Order in Council, 1900 was reproduced in the 1911 Order in toto with consequential changes: the Council was to be composed of the Administrator, appointed by the High Commissioner, a senior judge, the Resident Commissioner, who could attend, speak thereat but without a vote, and not less than three other members appointed by the BSAC with the approval of a Secretary of State.⁶ This provision could not stimulate political organization: it perceived the establishment of a non-political party

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1. UK: 1890, 54 & 55 Vic. 37, sec. 2, see also Morris, H.F. and Read, J.S., Indirect Rule and the Search for Justice - Essays in East African Legal System; Oxford, 1972, in particular Chapter 2.
 2. Northern Rhodesia Order in Council, 1911, Art.17.
 3. ibid. Art. 3.
 4. ibid. Art. 43.
 5. ibid. Art. 40.
 6. ibid. Art. 13.

administration, based on nomination or appointment. Although by 1911 territorial acquisitions and re-adjustments had come to an end in Central Africa, it was still premature for emergence of political parties formed either by the settlers or Africans aimed at challenging colonial rule or to complement colonial administration.

Party organization in its origin was in its core, a social formation; a body of persons coming together in the pursuit of a set of ideas and forming a social group in the area of society. For political organizations to emerge, the people in the society should be free to discuss and clarify their common ideas among themselves, formulate their goals and programmes and should be free to publicly defend such ideas, goals and programmes in discussions against other similar groups. Eventually, the groups acquire their own tags, leaders and policies, and, finally seek support from the members of the public. The provisions of Art. 13 of the 1911 Order were not aimed at stimulating that sort of political evolution and they were not formulated in contemplation of political activities among the majority of the people in the population, the Africans, who lived under their respective chiefly rule and were not yet ready or capable of exercising any of the political rights and duties of the kind anticipated by those provisions.

On the other hand, the handful white settlers, although not posed to oust colonial rule, perceived government in the context of democratic institutions in which they could participate on the basis of universal (male) adult suffrage.¹ The provisions of Art. 13 of the 1911 Order did not sanction the establishment of such a democratically elected representative assembly probably because of NR's status of being a 'protectorate' and not a 'colony' in which settlers could constitute a 'parliament' elected by universal suffrage. The provisions

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Infra, p. 50

however, acknowledged the need for a machinery through which the settlers' views could be channelled to the authorities. In as far as native aspirations were concerned, the 1911 Order empowered the Administrator to appoint, with the approval of the High Commissioner, a Secretary for Native Affairs and his officials styled Native Commissioner and Assistant Native Commissioners and Magistrate to administer 'native affairs',¹ a device to establish both central control and 'indirect rule' of the natives in that centrally appointed colonial officials were assisted by native chiefs in the administration of natives. The Order provided against discrimination by enacting that no conditions, disabilities or restrictions were to be imposed upon natives without the previous consent of a Secretary of State, save in respect of fire-arms, ammunition, liquor or any matter authorized by the Secretary of State.² This was an important provision in that, if properly construed and applied, it meant that the nearly one million indigenous people still living under a tribal form of organization could compete or work side by side with the thousand of settlers, highly educated, politically mature and economically powerful. For instance, if the settlers were free to form and belong to political parties or being granted universal suffrage, the natives should enjoy the same right without any condition, disability or restriction since that did not concern fire-arms, ammunition or liquor. There was divergence, however, between law and practice in that condition, disability or restriction was placed on the natives which was not correspondingly placed on the non-natives.³ Some of such restrictions etc., will be considered in the context of the establishment of governmental institutions.⁴

1. UK: Northern Rhodesia Order in Council, 1911. Art. 38(1).

2. ibid. Art. 39.

3. See for instance Reg. 5 of the Natives in the Townships Regulations, 1909, No. 4 which restricted native residence, presence and movements in townships, i.e. European-settled areas.

4. Infra, p. 49.

Section 2. The Establishment of Governmental Institutions.

The notion that Englishmen carried with them a right to a 'parliament' existed among the settlers of NR. However, in the early years of British electoral systems in settled territories, 'parliaments' were elected by an elite minority because the vote was available only to British males. In NR the British administration was reluctant to introduce a Legco or the vote or a political party system; for either the settlers or the natives. Instead, an advisory council was constituted.

(a) The Advisory Council.

In an attempt to implement Art. 13 of the NR Order, 1911, the BSAC Board in London wrote to the Administrator in Livingstone, then the capital of NR, stating as follows, viz

The Board will therefore be glad if you now take up the question of the appointment of a small advisory council chosen among the white settlers or Northern Rhodesia in the manner contemplated in the letter to the Colonial Office of 13th March (1913). As indicated in that letter, it hardly appears necessary to do more than ask the Northern Rhodesia Farmers' Association to nominate two or three persons to form an advisory council, the appointment of which might be notified for general information in the Gazette.

The council would be in a position to discuss with the Administrator any question affecting the white settlers of the territory and draft legislation affecting white inhabitants the promulgation of which was not urgent in point of time, could be submitted to it for its observation.¹

There was in this instruction a clear divergence or departure from the provisions of Art. 13 of the 1911 Order and the advisory council being advocated;² which proposed a body composed of settlers and not of ex-officio members and three others appointed by the BSAC and approved by a Secretary of State. Settlers' demands precipitated the change. On the 18th August, 1917, the North-Western Rhodesia Farmers' Association

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1. NR: Letter dated 2nd June, 1917, from A.M. Millar, Assistant Secretary, BSAC, London, to His Honour the Administrator, Livingstone: BS/3/146; Advisory Council (1917-1924); p. 1; NAZ-L. Brackets supplied by the writer.
 2. ibid. Letter No. 41/5/33 dated 11th December, 1913, from Harry Lambert, for Under Secretary of State, CO, to the Secretary, BSAC, London, required that provisions of Art. 13 of the 1911 Order be implemented; p. 1/7.

met and passed a number of resolutions thanking the BSAC for "the offer that settlers could form an Advisory Committee". But the settlers had different ideas from those contained in Art. 13 of the Order of 1911, in that they advocated for an advisory 'committee' composed of five members elected by voters registered on a general voters' roll. Accordingly, on 24th January, 1918, the Farmers' Associations¹ sent to the Administrator the following proposals, inter alia, that -

2. The Advisory Committee shall consist of five members who shall continue in office until the 31st of December, 1919.
3. The territory shall be divided into two Districts, i.e. (a) the North-Western District comprising the territory formerly known as North-Western Rhodesia, and (b) the North-Eastern District, comprising the territory formerly known as North-Eastern Rhodesia.
4. Every male British subject of European descent over 21 years of age, shall be entitled to vote in the district in which he resides provided that at the time of applying for voting paper he has for a period of six months immediately preceding such application:-
 - (a) occupied premises in the territory of the value of not less than £150 or has been in receipt of a salary of not less than £150 per annum, and
 - (b) can write and without criminal record.²

European women were by implication excluded from the vote. The Africans, males and females, were excluded because they were not of 'European descent' and by the fact that they were not 'British subjects' but 'British Protected Persons'. The vote was based on the Cape of Good Hope Colony's Parliamentary Voters' Registration Act, 1887,³ and the Franchise and Ballot Act, 1892.⁴ The latter granted the vote to British males, aged above 21 years, in receipt of not less than £50 salary per annum, or occupier of a house or a warehouse or a shop of the

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| 1. NR: | These were the North-Eastern Rhodesia Farmers' Association, the North-Western Farmers' Association and the Co-operative Society. |
| 2. | Letter signed by L.F. Moore, to the Administrator; 24th January, 1918; <u>BS/3/146, Advisory Council, (1917-1924), p. 24; NAZ-L.</u> |
| 3. Cape Colony: | 1887, No. 14; sec. 8, Schedules A and B. |
| 4. | 1892, No. 9; sec. 6, Schedule E. |

value of more than £75, able to sign his name and address unaided and a natural born or naturalized subject of H.M. the Queen, of sound mind and without a criminal record.¹ The principle that a franchise should be based on income, property ownership and/or education, was adopted quite early in English constitutional law system, in fact as early as 1430 when the franchise was restricted to freeholders having tenements to the annual value of forty shillings. The vote remained restricted to very few people until it was broadened by the Representation of the People Acts, 1832.² In 1918 when the Farmers' Associations in NR were making their franchise proposals, the UK Parliament had just enacted the Representation of the People Act, 1918,³ which gave the vote to males above the age of 21 years and females above the age of 30 years, and, the Parliament (Qualification of Women) Act, 1918,⁴ which provided, inter alia, that a woman should not be disqualified by sex or marriage from being elected or sitting or voting as a member of the House of Commons. It was, however, not until 1928 when the Representation of the People (Equal Franchise) Act, 1928,⁵ provided that Parliamentary franchise should be the same for men and women. The requirement for income and property was replaced by mere residence in the parliamentary constituency.

The divergence between the law (Art. 13 of the NR Order, 1911) and the proposals of the settlers was caused by the contradiction colonial rule encountered in plural societies in Africa. The settlers always craved for a representative legislative body, but such a body could only be constituted with native participation. Universal suffrage for all the people of NR would not have resulted in the establishment

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| 1. Cape Colony: | Franchise and Ballot Act, 1892, Schedule E, sec. 6. |
| 2. UK: | 2 & 3 Will 4, c. 45, c. 65 and c. 88, see also Keir, D.L., <u>The Constitutional History of Modern Britain Since 1485</u> ; Adam Charles Black, 1975, 9th ed., p. 416. |
| 3. | 7 & 8 Geo. 5, c. 47, secs 1(1) and 4, respectively. |
| 4. | 8 & 9 Geo. 5, c. 64 |
| 5. | 18 & 19 Geo. 5, c. 12 |

of governmental institutions committed to the preservation of settler ideals, values, traditions and interests. The Administrator conceded that there was a divergence from the law and that the council being devised was not the same as the council provided for under Art. 13 of the 1911 Order in Council. The one the settlers were dividing

is an advisory council without Legislative or Executive Power, members to be nominated or elected by the Farmers' Association or elected on a broad basis in some simpler manner. The members so elected or nominated will be accepted by the Administrator as a Council, not constituted on any legal enactment, with whom he would discuss matters of importance affecting the white settlers, except in cases which are too urgent to admit of advice being taken.¹

The Farmers' Associations accordingly on 1st July, 1918, held the elections. In the North-Western District, 1,391 persons registered as voters. Seven candidates stood for the four seats allotted to the District. In the North-Eastern District only one candidate who stood for the one seat allotted to the District, John Lindsay Bruce, was duly declared elected unopposed.² The advisory council so constituted was composed of the High Commissioner, the Administrator, the Resident Commissioner and the five elected members. Minutes of the council show that Government officials also attended. As a matter of fact the advisory council was the Council as envisaged by Art. 13 of the NR Order in Council, 1911 except for the presence of elected members. The Imperial Power acquiesced in the settlers' contrivance in establishing a quasi-elected governmental body in an African protectorate and not a settler territory. Later the advisory council demanded that native view should be expressed through a body of settlers, that is, representatives of African interests.³

1. Livingstone Mail, 18th March, 1918; being a portion of the Administrator's

'Letter to the Editor' on the nature of the council.

2. NR: BS/3/146, Advisory Council (1917-1924) op. cit., pp. 26-27.

3. ibid. Advisory Council, 'Native Policy', discussed by the Council on 19th July, 1921; p. 1/67.

The establishment of the Advisory Council did not generate any political organization among the settlers mainly because the Council was devoid of legal basis and had a small electorate. The Farmers' associations were loose aggregations concerned not with politics, but the agricultural industry although some of their leaders held some political opinions particularly on such matters as 'native policy' and the role of the BSAC in NR. The importance in the establishment of the Advisory Council lay in the fact that it preceded the emergence of formal political parties but was based on the principle of election; an acknowledgement that democratic representation was depended on explicable people's choice. The settlers' rejection of the letter but the acceptance of the spirit of Art. 13 of the 1911 NR Order, was probably based on their desire to see that the constitutional evolution of NR followed the patterns of SR and South Africa: 'responsible government' for the settlers.¹

(b) Formation of the Legco.

The Advisory Council gave settlers a limited say in the legislative matters before the Administrator and High Commissioner but no say in executive matters or native affairs. These fell within the prerogative of the Administrator and the High Commissioner, acting either alone or on the advice of the BSAC Board. The settlers pressed for a 'representative body' to replace the Advisory Council. British jurisdiction in foreign lands was based on the provisions of the Africa Order in Council, 1889, made under the Foreign Jurisdiction Act, 1843. The gist of this legislation was to the effect that within a local jurisdiction, constituted under the Order, H.M. had power and

1. UK: Southern Rhodesia Order in Council, 1898, Art. 13(1) constituted an Advisory Council consisting of the Administrator, as President, the Resident Commissioner and not more than four members appointed for three years by the BSAC. A Legislative Council was established in 1911.

authority over British subjects. This was the legal framework within which British administrators worked in NR. The Buxton Committee which was appointed on the 7th March, 1921, to advise H.M.'s Government on a number of issues raised in a petition presented by settlers in NR, expressed the view that settlers' claim to be more associated with the government of NR, was reasonable and that the BSAC should, in order to meet that demand, establish a Legco.¹ Nothing was said about African association with the government of their country.

The Northern Rhodesia Order in Council, 1924, terminated the BSAC administration of NR and established direct CO administration headed by a Governor,² who assumed office on 1st April, 1924.³ The establishment of the Legco expanded and extended the jurisdiction of the Crown and stimulated political activity among settlers. The Legco so established was composed of the Governor (as President), five ex-officio members (the Chief Secretary, Attorney-General, Financial Secretary, Secretary for Native Affairs and Principal Medical Officer), four Nominated Official members and five elected members.⁴ For the purposes of transitionally constituting the Legco, the five members of the Advisory Council, which was abolished following the establishment of the Legco, were co-opted as the five elected members of the Legco. The establishment of the Legco was obviously intended to constitute a legislative body composed of CO officials and settlers but excluding the indigenous people. That was made clear by its composition and the franchise adopted which was an elaboration of the franchise devised by

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1. UK: Report of the Committee on Rhodesia; Cmnd. 1921/1471, p. 55.
 2. Northern Rhodesia Order in Council, 1924, Art. 6; BFSP, 1924, Vol. 119, p. 41.
 3. NR: Gazette, 8th May, 1924, Proclamation No. 3, 1924.
 4. UK: Northern Rhodesia (Legislative Council) Order in Council, 1924, S.I. 1924/324, Arts, 3, 4 and 5; BFSP, Vol. 119, p. 377. The Legislative Council Ordinance, 1925, No. 25, Cap. 19, sec. 3 increased the number of elected members from 5 to 8.

by the Farmers' associations in 1918 for the purposes of election of the members of the Advisory Council. The qualifications for voters and candidates for election to the Legco were as follows, viz

- (a) British subject (male or female);
- (b) Occupation of property in NR valued at over £250;
- (c) Ownership of a registered mining location or alluvial claim in NR;
- (d) Income or salary of over £200 per annum;
- (e) 21 years of age and over;
- (f) Ability to complete a voter application form unaided;
- (g) Without a criminal record and not declared of unsound mind or bankrupt.¹

Through these constitutional innovations the settlers had succeeded in converting the Advisory Council into the Legco and their franchise into a legal instrument. Africans in NR did not participate in the creation of the Legco or its membership and it was said that "their loss was not great".² The establishment of the Legco, however, did not stimulate political organization among the settlers until 1941 when the NRLP was formed.³ The elected members stood as 'independants' and their role was mainly not to oppose but influence Government policy. The franchise discouraged African political organization aimed at the registration of African voters since at that time there were about ten Africans registered as British subjects. The denial of the vote and the exclusion of Africans from the membership of the Legco were in themselves sufficient stimulants for African political mobilization. If African political organization had appeared at that stage, it was likely that its aim would have been to influence colonial policies and not to oppose the colonial government because the concept of self-rule or independence had not yet appeared in the African society. The settlers had not opposed colonial rule because they were identified with it. Initially the Africans would have preferred to influence colonial rule from within than opposing it from outside. The settlers only in the later stage when the

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- 1. NR: Legislative Council Ordinance, 1925, No. 25, Cap. 19, secs. 9, 11, 12 and 13.
 - 2. Gann, L.H., A History of Northern Rhodesia: Early Days to 1953; Humanities Press, N.Y., 1969, p. 179.
 - 3. Northern Rhodesia Labour Party.

elected members of the Legco had doubled, behaved as if they were an opposition to the Government in which some of them held departmental posts. The Executive Council established under the 1924 Order in Council was composed of the Governor, as Chairman, the five ex-officio members of the Legco and such other members not holding office in the Public Service of the territory as the Governor in pursuance with H.M.'s Instructions, might appoint.¹ Africans were not included in the Executive Council. The exclusion of Africans from both the Legco and the Executive Council denied them of an opportunity to utilize these institutions of Government as training ground for self-government. The 1924 Order in Council, however, contained some provisions protecting some African interests, for instance, the approval of the Secretary of State was required to be obtained before a native could be removed from a native reserve,² except in the execution of the process of a competent court. The Order in Council establishing the Legco provided that the Governor could declare that a Bill not passed by the Legco enter into force,³ provided that wherever he exercised this power, he should report the same to the Secretary of State, and Art. 25 of the same Order in Council reserved the approval of certain categories of Bill relating to natives to H.M. unless the Governor had been authorized by the Secretary of State to consent thereto. Under Art. 26 H.M. could through the Secretary of State disallow any law enacted by the Legco and assented to by the Governor. Only two Ordinances were disallowed between 1924 and 1964.⁴

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1. UK: Northern Rhodesia Order in Council, 1924, Art. 15. An ex-officio member resigned from Legco through a letter to the Governor: M.A. Baldock, MBE, letter to the Chief Secretary, Livingstone, 16th January, 1925; NR/b/1/1A671 Legislative Council (1924); NAZ-L.
 2. ibid. Art. 43(1) as amended by Art. 9 of the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, 1929, S.I. 1929/246.
 3. Art. 24(1) Northern Rhodesia (Legislative Council) Order in Council, 1924 as amended by Art. 24(2) of the Northern Rhodesia (Legislative Council) (Amendment) Order in Council, 1959, S.I. 1959/105.
 4. NR: The Village Management (Amendment) Ordinance, 1925, No. 6 and the Imperial Acts Extension Ordinance, 1929, No. 9.

Following the establishment of the Legco, settlers pressed for more elected members in both the Legco and the Executive Council and resisted the application of the policy of the 'paramountcy of African interests' to NR.¹ The formation of the first European political party in NR, the NRLP in 1941, was opposed by Colonel Stewart Gore-Browne, the first European to be appointed an Unofficial Nominated member representing African interests in the Legco, who felt that it was premature to introduce party politics in the country.² The founder of the NRLP, Roy Welensky's reply was that he was not introducing party politics, but merely wished to achieve an unofficial members' unanimity by having a dominant party in the Legco.³ The following shows that the composition of the Legco had changed considerably by 1948:-⁴

Speaker	
<u>Ex-Officio</u> members	6
Nominated Official members	3
Nominated Unofficial members (representing African interests)	2
Elected members	10
African members	2

If the situation in 1941 was considered premature for European political parties, the introduction of African political parties during that period was out of the question altogether. Consequently, although African political organization had emerged between 1941 and 1948, the two African members of the Legco were excluded from the process of popular election by the general voters, instead they were selected by an electoral college, the ARC. The increase in the number of elected members in the Legco and settler political mobilization and the denial of the vote and direct elected representation to the Africans, led to Africans to begin to organize politically to unitedly demand that these rights be extended to them.

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1. UK: Correspondence with regard to Native Policy in Northern Rhodesia; Cmnd. 1930/3731, pp. 2 - 3.
 2. Clegg, E., Race and Politics; Partnership in the Federation of Rhodesia and Nyasaland; Oxford, 1960, p. 74.
 3. UK: ibid. p. 75. First European representative of African interests was appointed under Art. 3, Northern Rhodesia (Legislative Council) (Amendment) Order in Council, 1938; BFSP, 1938, Vol. 142, p. 39.
 4. Northern Rhodesia (Legislative Council) (Amendment) Order in Council, 1948, S.I. 1948/340, Art. 3.

Section 3. The Emergence of African Political Organization.

The description 'African political party' or 'organization' refers to a political organization formed by Africans for the acquisition and/or protection of African interests although its membership might have been left open to non-Africans. The importance or relevance to this study of the historical background of African political organization lies in two factors, first, the early organizations magnanimously laid the foundation upon which is based the present central role of UNIP, and, secondly, they were the objects or subjects of the legislation that determines the present status of UNIP. This Section is therefore, mainly concerned with these two factors of the emergence and role of African political organizations, and, their fight for self-government.

The origins of political organization among Africans in NR were in the native welfare associations formed at local level mainly in urban areas and along the line of rail although the first to appear was in a rural area, a mission centre known as Mwenso, in 1923, where the minister in charge was Rev David Kaunda, the father of the first President of Zambia, Kenneth David Kaunda.

(a) The Native Welfare Associations.

The Mwenso-type native welfare societies appeared at Livingstone,¹ at Ndola,² at Mazabuka,³ at Kabwe,⁴ at Lusaka,⁵ and at Choma.⁶ These associations were basically concerned with social and cultural affairs of the Africans but they also provided a link between the Africans and the colonial administrators, local government

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| 1. NR: | <u>SEC. 2/442, April, 1930, Livingstone Native Welfare Asscoaition, NAZ-L.</u> |
| 2. | <u>SEC. 2/443, October, 1930, Ndola Native Welfare Society</u> |
| 3. | <u>SEC. 2/444, October, 1930, Mazabuka Native Welfare Society</u> |
| 4. | <u>SEC. 2/445, November, 1930, Kabwe Native Welfare Society</u> |
| 5. | <u>SEC. 2/452, April, 1931, Lusaka Native Welfare Society</u> |
| 6. | <u>SEC. 2/454, May, 1931, Choma Native Welfare Society</u> |

authorities and mining companies. The native welfare societies were loyal to the Government and minutes of a meeting of the Livingstone association held on 15th March, 1932, contain a statement made by the chairman of the association, one Rankin Isaac Nyirenda, to the effect that "Some people think we want to chase white people from this country, or we are against the Government. We do not intend to be in unagreeable terms with the British Government. We are, to this Government, as children are to their parents. This Association is our mouth-piece to the Government."¹ The Administrators' view was that native welfare associations were useful means through which Africans articulated their grievances and give constructive suggestions.² The authorities, however, were opposed to a combination of all the associations on the ground that it was premature and that some organization to represent the interests of all the natives in the territory could "best be obtained by a further grouping of the native authorities in the different districts and members of the Welfare Associations can keep on best each in his own tribe by trying to overcome tribal jealousies. They might also consider that in the organisations set up amongst Europeans the Legislative Council is not an amalgamation of Town Councils and Management Boards".³

Although English law did not burden itself with a sharp division or dichotomy between public and private law that is such an important feature of French law, the colonial administrators did evolve a form of administrative law in NR through the administration of natives legislation,⁴ enforced by the Secretary for Native Affairs and his Native Commissioners and Assistant Native Commissioners, Magistrates and Chiefs.⁵ There was no

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1. NR: Native Welfare Association, Livingstone, (1931-34)
ZA 1/9 45/1; p. 5(1): NAZ-L.
 2. ibid. p. 7
 3. ibid. p. 11, and Native Welfare Association, NAT.
M/3/2, letter of the Chief Secretary, 27th July, 1932,
to Provincial Commissioner, Livingstone.
 4. Northern Rhodesia Order in Council, 1911, Art. 38.
 5. Northern Rhodesia Administration of Natives Proclamation,
1916, No. 8 of 1916: Statute Law of NR, 1917, p. 631.

room or role for a country-wide native political organization. Although in 1932 the authorities appeared reluctant to sanction the amalgamation of all native welfare associations, the initial reaction of the authorities was for such a union. The first application of the Livingstone association to the authorities for recognition, was headed 'Northern Rhodesia Native Welfare Association' and dated 27th May, 1929. In response to this application, the Assistant Secretary for Native Affairs informed the Association to delete the name 'Northern Rhodesia' and replace it with 'Livingstone' and ended his letter saying:

6. The Association can rest assured that so long as its aim and object is to introduce civilization among the native people of the Territory and to instruct them to live as good African subjects of His Majesty the King, it will have the support of the Native Affairs Department.

If the Association does well, no doubt other associations will start to work in other places. Then when you have several Associations, it might be possible to join them all into one large Association.¹

The constitution of the 'Northern Rhodesia' Native Association lodged with the authorities together with the application of 27th May, 1929, had included among its aims and objects the promotion of brotherly cooperation and feeling among the native people of NR, the representation of native opinion to the authorities, the spread of civilization by education, industrial and agricultural development among the natives of NR.

Two reasons were given to the Association for the authorities' opposition to the formation of a country-wide native welfare association: first, that Chiefs had been given local control of their parochial affairs by the Native Authority Ordinance, 1929² and Native Courts Ordinance, 1929³ and that native welfare associations were not the medium through which natives should submit grievances to the Government.⁴

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1. NR: Letter Ref. 37-45/1930, 11th February, 1930, signed by J.W. Sharratt: ZA/1/9 45/1(1), op. cit., p. 11.
 2. 1929, No. 32; secs. 3 and 4.
 3. 1929, No. 33; secs. 8 and 14.
 4. Letter No. 37-45, 7th July, 1930, signed J. Moffat Thompson, Secretary for Native Affairs, to the Chief Secretary; Native Welfare Association, ZA/1/9 45/1(1) loc. cit., p. 11.

There were two other reasons contained on the files which were not communicated to the Association, first, that the Association had engaged in political issues by criticising the sentencing policies of the High Court on native offenders and by expressing disappointment with the Government's failure to implement British 'fundamental principles of justice expected after the Territory was taken over in 1924 from the BSAC.' The second undisclosed reason was that some officials of the Association were in touch with Marcus Garvey of the 'Back to Africa' Association who had asked them to collect evidence in Northern Rhodesia of cases of injustice to natives.¹

During the period 1934 and the outbreak of the Second World War, the native welfare associations' role was nearly taken over by country-wide organizations of African workers, for instance, the strikes in 1935 gave the impression that there was emerging a more radical African leadership outside the native welfare associations.² In 1937, one John Michelo, launched the first national organisation, the African Congress, which, having been refused permission to operate, disappeared. During the war years, the native welfare associations' activities were suspended but soon after the war, a conference was called on 18th May, 1946, where a country-wide Federation of Native Welfare Association was formed. The objects of the Federation³ were those contained in the NR Native Welfare Association constitution of 27th May, 1929 - brotherly cooperation, interpretation to the Government of native opinion and the spread of civilization.

(b) The First African Political Party, NRAC is Formed.

The Federation of Native Welfare Association at its annual conference held between 9th and 11th July, 1948, resolved that

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1. NR: Native Welfare Association, ZA/1/9 45/1(1), p. 45.
 2. UK: Report of the Commission appointed to enquire into the Disturbances in the Copperbelt, Northern Rhodesia; Cmnd. 1935/5009. (Chairman: Sir William Alison Russell).
 3. Northern Rhodesia Federation of Native Welfare Association, Constitution, 1946, Art. 34 (a) to (d): Native Welfare Association, Livingstone, ZA/1/9 45/1(1), p. 10(B).

the Association be converted into a congress and that resulted in the formation of the NRAC under the leadership of Godwin Mbikusita Lewanika. In the absence of legislation expressly providing for political parties, the Congress like the welfare associations, the Federation and Michelo's Congress, required Government approval before they could function. The NRAC applied for 'recognition' of the Government. In 1948 the Government was confronted by two obstacles if it purported to refuse the NRAC to function, first, unlike the Congress in 1937 which was restricted to the southern province of NR only, the NRAC, being formed by the country-wide Federation of Native Welfare Association, could not be easily suppressed. Secondly, the NANC had in 1945 applied to the NR Government to form and operate branches in NR. The Government of NR had sought clarification 'on the origins and status of the NANC' from the Government of Nyasaland,¹ and which had replied as follows:

4. The organisation is recognised by Government as representing the various African Associations in Nyasaland, but it is entirely an unofficial body responsible for its own organisation and finances which do not come under the supervision of Government.²

The first application to recognize a NANC branch in NR was made in January, 1945, in Luanshya, on the Copperbelt, where a large number of workers from Nyasaland (to-day's Malawi) were employed in the copper mining industries. The Western (now Copperbelt) Provincial Commissioner, writing to the Chief Secretary regarding this application, observed:

In my opinion alien Natives living in this Territory should content themselves with the existing organisations such as Urban Advisory Council and African Provincial Councils.³

He accordingly reserved his approval of the recognition of the NANC branches on the Copperbelt. In the colonial usage, an 'alien native'

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1. NR: Nyasaland African Congress (1945-47) SEC. 2/1271/NAT M/5, 23rd January, 1945; p. 8: NAZ-L.
 2. ibid. Letter 13th February, 1945; p. 8.
 3. ibid. Letter 8-A/Y/2, 16th April, 1945; p. 27.

meant a native of Africa who was not a native of NR, for instance, a native of Nyasaland working in NR. Notwithstanding the reservation, the Government of NR having given permission to a political organization of alien natives to operate in NR in 1945, it could not find any justifiable ground on which to base its refusal to permit 'its own natives' political organization to operate in the Territory. The NRAC was accordingly recognized.¹ Three years later at a conference of the NRAC held on 22nd July, 1951, the name of the NRAC was changed to NRANC and Harry Mwaanga Nkumbula took over its leadership until the party was proscribed in 1972 to give way to the establishment of a one-party system. During the period 1951 and 1958 no other African political party emerged. The Constitution of the NRANC contained sixteen Clauses on the aims and objects of the organization and among these were the following, viz

- (a) To promote, guard and protect the political, economic, educational, material, social interests, advancement and well-being of all Africans of Northern Rhodesia;
- (e) To foster and encourage a spirit of loyalty to the British Crown and the British Commonwealth;
- (f) To work for broadening of citizenship and for universal adult suffrage based on one man one vote leading to self-government and independence;
- (g) To promote the candidature of Congress members or sympathisers for the Legislative Council or any other public office in the Territory.²

The importance in the emergence of the native welfare associations, the Federation of Native Welfare Associations, the NRAC and the NRANC lay in the fact that under a rudimentary indirect-rule system then being tried in NR, these organizations did not appear as provincial organizations but as national bodies. Their relevance to the study of the legal aspects of the role of UNIP in Zambia lies in the fact that they laid the foundation for a one-party system in that at a time when the concept of a NR nation was inconceivable, they organized nationally, and thereby provided the African people with a national forum through which they, as a group,

1. NR: Letter of authority dated 17th May, 1945; Native Welfare Association, NAT/M/25, p. 28; NAZ-L.
 2. NRANC: Constitution, 1952, Art. 2

could achieve political advancement. The Governor was required "to the most of his power, to promote religion and education among the native inhabitants of the Territory" and he was especially to take care to protect them in their person and in the enjoyment of their possessions and by all lawful means to prevent and restrain all violence and injustice which might be practised or attempted against them.¹ The Africans in NR had no (and still to-day do not have) a common native customary law for the whole society. They had no overall national political organization. The numerous customary laws did not provide for political organization either nationally or locally. Although law is conceived as the property of a society as a whole, the Common Law, though it was supposed to have been imported to apply to NR as a whole, it was basically imported to regulate the affairs of the settlers. Consequently, the emergence of African political parties was not left to be regulated by the Common Law, but by administrative intervention. The Governor was not obliged to promote 'politics among the native inhabitants' of NR, nor was the Common Law expected to protect political organization among Africans, particularly in the face of such legislation which provided, inter alia, as follows:

The Administrator exercises over all natives all political power and authority, subject to such powers as may be reserved by the Order in Council or Proclamation to the Secretary of State or to the High Commissioner.²

Consequently, NR produced political parties which, in spite of their well-phrased aims and objects, hardly promoted any social or economic or educational projects for their members in particular and members of the public in general. They did not publish party newspapers or books. They did not organize any self-reliance projects. Their role

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- 1. UK: Northern Rhodesia Order in Council, 1924, Royal Instructions, 1924, Clause 23.
 - 2. NR: Proclamation of His Excellency the High Commissioner, NR, No. 8 of 1916: Statute Law of NR, 1917, p. 631.

as can be gathered from correspondence between the native welfare associations and the NRANC, was often in the nature of constant appeals to the authorities for equitable distribution of social facilities and humane enforcement of legislation concerned with the control and/or the presence of Africans in urban areas mainly the Municipal Corporation Ordinance, 1927,¹ the Townships Ordinance, 1929,² and the Mine Townships Ordinance, 1932.³ This legislation made Africans aliens in urban areas.

The amalgamation of the native welfare associations into the Federation did not produce any tangible results showing the indigenous people's worthy of advancement through their own combined self-improvement effort in social, economic and political spheres. The Federation was not a mass organization and its leadership was composed of elite chiefs, teachers, clerks, social workers and the like.⁴ The Federation, however, for the time-being provided an organization with a national outlook in that although its leadership was composed of town dwellers, these had been drawn from most of the regions of the territory. That national outlook was the important legacy it gave the NRAC and NRANC whose leadership was not different from that of the Federation. Like the Federation, both the NRAC and the NRANC although they promoted brotherly cooperation and feeling among the African people of NR, had no means of spreading any civilization through education, industrial and agricultural development because they lacked funds and educated manpower. Only the government and industrial and commercial corporations had such means. These organizations could, therefore, only appeal to the authorities for social improvement among Africans. The view that if African social, economic and political developments were to move fast the Africans must rule themselves, followed later, partly as a result of frustration with colonial inequalities.

1. NR: 1927, No. 16, Cap. 470.

2. 1929, No. 53, Cap. 471.

3. 1932, No. 11, Cap. 472.

4. Epstein, A.L., Politics in an Urban African Community; Manchester UP, 1958, p. 67 and p. 159ff. See also Henderson, I., and Warhurst, P., Revision in Central African History to 1953; Central African History Association, Pamphlet No. 15, 1965, p. 27.

Section 4. Mass Organization and Legislation Controlling Political Parties.

The emergence of the NRANC coincided with the creation of the Federation of Rhodesia and Nyasaland.¹ Africans in NR and Nyasaland were opposed to the Federation mainly for two reasons, first, they saw the Federation as an indirect means of terminating the protectorate status of their countries and converting them into European-settled territories and, secondly, while Europeans were granted the vote on the basis of adult universal suffrage in the election of European members of the Legco and the Federal Parliament, African representation in these institutions were through selection by specially constituted bodies.² In Nyasaland the designated body was the Nyasaland African Protectorate Council³ and in NR the ARC.⁴ The Federation had a population of 8 million people of which 7 million were Africans, 297,000 Europeans, 25,000 Asians and 13,000 Coloureds. At its inception the Federation's Parliament was composed of thirtyfive members; increased in 1957 to SR 24, NR 14 and Nyasaland 6 elected by the Common Roll, that is European members elected by European electors; Africans, SR 2, NR 2 and Nyasaland 2 returned on a Specially Elected franchise. There were three European representatives of African interests one each from SR, NR and Nyasaland. While European representation was open to political party contest, that of Africans was based on a non-political party system; that frustrated African political party organization.

In NR at the time of the creation of the Federation in 1953 the Legco was composed of the Speaker, 8 ex-officio members, 6 Unofficial Nominated members appointed by the Governor, two of whom were representatives

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| 1. UK: | Rhodesia and Nyasaland Federation Act, 1953, 1 & 2 2 Eli. c. 30; <u>BFSP</u> Vol. 160, p. 30. |
| 2. | Rhodesia and Nyasaland (Constitution) Order in Council, 1953, S.I. 1953/1199, Art. 13. |
| 3. Nyasaland: | General Notice No. 180, 23rd October, 1953, Nyasaland Government <u>Gazette</u> . |
| 4. NR: | General Notice No. 309, 30th October, 1953, Northern Rhodesia Government <u>Gazette</u> ; <u>infra</u> , p. 75. |

of African interests, four Africans, selected by the ARC and nominated by the Governor, and 12 Europeans elected by Europeans: the franchise as devised by the Advisory Council in 1918 and confirmed with the establishment of the Legco in 1924.¹ The NRANC's attitude to the Federation and the constitutional position in NR was stated in its detailed Memorandum to the Government in which it laid down seven major areas of African discontent in the Territory. These areas were, first, discriminatory legislation and practices against Africans, second, administrative proscription of some NRANC Branches, third, restrictive legislation against political organization, fourth, lack of freedom of movement, association and assembly, fifth, official obstacles to cooperation between the NRANC and the African labour movement, sixth, official reprisals against African civil servants and chiefs who joined or sympathised with the NRANC, and, seventh, the franchise law and the imposition of the Federation.² All these seven subjects could be summarized in into one sentence, namely, discontent with discriminatory legislation and practices.

The CO's view of discriminatory legislation in the dependencies of Britain could be gathered from a circular letter dated 8th January, 1947, addressed to Governors and Officers Administering the Governments of British Protectorates and Colonies informing them that in pursuance to the provisions of Art. 1(3) and Art. 68 of the Charter of UNO, 1945, racial discrimination had been specially remitted for examination by the UNO's Commission of Human Rights with the terms of reference to draft an international Bill of Rights, and, to consider racial discrimination in general. The Colonial administrators were, thereby

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1. NR: Legislative Council Ordinance, 1925, No. 25, sec. 3.
 2. NRANC letter dated 8th September, 1954, signed by General Secretary, K.D. Kaunda, addressed to the Secretary for Native Affairs: African National Congress, B/5-291, NR. 11/158; NAZ-L; infra, p. 209.

required to undertake factual surveys of legislation considered to be discriminatory and to indicate what steps, if any, were being taken against such legislation.¹ Discriminatory legislation, wrote the Secretary of State (for the Colonies), was necessary in certain circumstances:-

Some may be required in the interest of the local non-European races. Some might be defended of being necessary for the protection of the health and living conditions of the sections of the community who have at present widely differing standards in these matters. Some may be incapable on broad political grounds of any immediate change. The purpose of this survey would be to list the provisions of the law which are, or can be susceptible to modification or repeal, and, in cases in which repeal is not considered possible, to state the reason.²

Although NR's reply contained seven pages of titles and brief analyses of legislation considered discriminatory, the exercise did not result in any changes in discriminatory legislation or practices. This Section, however, is concerned with legislation regulating political organization and freedom of assembly and association.

(a) Legislation Controlling Political Organization.

British colonial administration in some parts of Africa sometimes encountered native opposition and in some cases even uprisings. In such situations general administrative measures were used to contain the crisis and/or special legislation was enacted to control persons or organizations. In Nyasaland (now Malawi), the Rev. John Chilembwe uprisings led to the enactment of the Seditious and Dangerous Societies Ordinance, 1927³ which empowered the Governor in Council, when satisfied that a society, which included a political party, or body of persons, whether corporate or incorporate, established in the Protectorate, had doctrines or disseminated

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1. NR: Discriminatory Legislation: European and Non-European; SEC./2/298, NAT./D/11 (1947); CO Letter No. DC 7923/1, dated 8th January, 1947, p. 1; NAZ-L.
 2. ibid. p. 1.
 3. Nyasaland: 1927, No. 9, Cap. 50: every order made by the Governor in Council under sec. 2 of the Ordinance was required to be reported to the Secretary of State together with the reasons for making it: sec. 4. See also, infra, p. 452.

sedition information detrimental or dangerous to the maintenance of public security or public order, order that the society, organization or body of persons cease to operate in the Protectorate.¹ In Tanganyika (now Tanzania) the British administrators, faced by a peaceful political mobilization by Africans, enacted the Societies Ordinance, 1954,² which defined the 'society' to include any club, company, partnership or association of ten or more persons whatever its nature or object but to exclude the following, viz

- (a) any company registered under the Companies Ordinance (Cap. 212) or any company which had complied with sec. 321 being an exempt company, or
- (b) any company, council, authority, association, board or committee lawfully constituted or established under a Royal Charter, or Royal Letters Patent, or any Imperial Act, or any law for the time being in force in the Territory.³

Trade unions (registered under the Trade Union Ordinance, Cap. 84) and cooperatives (registered under the Cooperatives Ordinance, Cap. 212) were also excluded. Political parties were not mentioned by name either among the organizations included or excluded from the definition of 'society'. The Governor in Council was empowered to declare a society unlawful if satisfied that it was used for purposes prejudicial to, or incompatible with, the maintenance of peace, order and good government in the territory.⁴ Both the Nyasaland and Tanganyika societies legislation vested the power to declare a society unlawful in the Governor in Council, which meant that the exercise of the power could be a subject of debate not in the Legislative Council but at least in the Executive Council. Since Executive Councils were advisory, the decision was that of the Governor.

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- 1. Nyasaland: 1927, No. 9, Cap. 50, sec. 2. On the Rev. John Chilembwe uprisings see: Williams, T.D. Malawi, the Politics of Despair; Cornell, UP, 1978, pp. 110-118.
 - 2. Tanganyika: 1954, No. 11, Cap. 337, later amended by the Societies (Amendment) Act, 1962, No. 76.
 - 3. ibid. sec. 2.
 - 4. ibid. sec. 6.

In Nigeria the criminal law was used in the control of political organization, e.g. the Governor in Council was empowered to declare any society¹ - a term which included a political party - as an unlawful society if considered dangerous to the government of Nigeria.² In NR although European political organization had appeared in the early 1940's, no legislation, other than the Penal Code, 1930³, was enacted to control political parties until the NRANC intensified its opposition to the Central African Federation and its demands for constitutional changes in NR, that the Societies Ordinance, 1955⁴ was passed based on the Tanganyika Societies Ordinance, 1954, aforesaid. The fact that the Societies Ordinance was intended to control the NRANC's activities can be gathered from some of its provisions, e.g. on the utilization of party funds. The NRANC launched a country-wide fund-raising campaign to send a delegation to London to protest against the imposition of the Federation. The Ordinance required that every society⁵ should furnish the Chief Secretary with its Constitution, a list of its office-bearers and of its objects for which donations and subscriptions solicited by the society would be used. Each society was required to furnish the Chief Secretary with a financial statement certified by a responsible officer of the society, showing the assets and liabilities, receipts and expenditure of the society and a report of an auditor approved by the Chief Secretary.⁶

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1. Nigeria: Criminal Code, 1916, No. 15, Cap. 42, sec. 62(a)(ii). See also Aguda, A. and Aguda, O., "Judicial Protection of Some Fundamental Rights in Nigeria and the Sudan Before and During Military Rule", JAL, 1972, p. 136.
 2. Unlawful Societies Order, No. 19, 1950: "The society known as 'Zikist Movement' is declared for the purposes of Chapter IX of the Criminal Code to be dangerous to the good government of Nigeria." Laws of the Federation of Nigeria and Lagos; 1958, Vol. VII, Cap. 42, p. 154.
 3. NR: 1930, No. 42, Cap. 146.
 4. 1955, No. 43, Cap. 105.
 5. ibid., sec. 2, definition of 'society' included a branch of a society.
 6. ibid. sec. 5, similar to sec. 16 of the Societies Ordinance of Tanganyika.

There were penalties against every society and every officer of the society for false reports or entry or statement and omissions regarding the matters to be lodged with the authorities.¹ In addition to that, a failure to comply with the law could result in the society being wound-up upon an application of the Attorney-General.² The civil capacity of the society was as follows:

7. (1) The person or persons controlling the income, expenditure or funds of a society may sue or be sued in his or their representative capacity on behalf of the society.

(2) Any judgement or order of any court obtained by or against the persons mentioned in sub-section (1) of this section shall be enforced for the benefit of or against the society, and any moneys required to be paid under such judgement or order shall be paid into or satisfied out of, as the case may be, the funds of the society.

These provisions equated political organization to commercial activity and could not therefore satisfactorily cope with the increased political agitation of the NRANC. In 1957 the Ordinance was repealed, the functions of the Chief Secretary were vested in a Registrar of Societies.³ the power to cancel any registration of a society was, however, retained by the Governor in Council, and that power could be used, inter alia, on the ground that the society concerned had in his opinion among its objects, or was, in his opinion, likely to pursue, or to be used for unlawful purpose or any purpose prejudicial to or incompatible with the peace, welfare or good government or order in the territory.⁴ The NRANC was a mild political organization and the enforcement of these provisions followed a split in NRANC and ZANC was formed; the latter was militant. The point of conflict in central Africa during this period was fear: the settlers were afraid that if political power was shared with or given to the indigenous people, that

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1. NR: Societies Ordinance, 1955, sec. 6, similar to sec. 30(3) of the Tanganyika Societies Ordinance, 1954.
 2. ibid. sec. 9
 3. Societies Ordinance, 1957, No. 65, came into force on 2nd June, 1958.
 4. ibid. sec. 23, similar to sec. 21 of the Tanganyika Societies Ordinance, 1954.

would bring to an end the system of government they were accustomed, and, the Africans were afraid that if power was transferred to the settlers, they would lose the right to ever rule themselves.

(b) Split in NRANC: ZANC Formed.

The split in NRANC occurred over the new constitutional provisions for NR which extended the Federal franchise to NR¹ and proposed a Legco composed as follows:

Speaker	1
<u>Ex-Officio</u> members	4
Nominated Official members	2
Nominated Unofficial members	2
Elected members:	
Ordinary Constituencies	12
Special Constituencies	6
Reserved (European)	2
Reserved (African)	2

The NRANC had put forward its own proposals that the Legco should be composed of a Speaker, 35 elected members (21 Africans and 14 Europeans) and seven nominated members, and, the Executive Council composed of Governor, three ex officio members, three Africans and three Europeans.² These proposals were rejected. The leader of the NRANC, Harry Nkumbula agreed with the Government proposals, while those opposed to the proposals broke from his leadership to form the ZANC which applied for registration to the Registrar of Societies on 1st December, 1958, under Rule 5(i) of the Societies Rules made under the Societies Ordinance, 1957, stating in paragraph 4 of the application that it had working relationship with the PAFMESCA and the British Labour Party.³ It was registered on the 9th February, 1958.⁴

1. NR: Proposals for Constitutional Change in Northern Rhodesia, 28th March, 1958; Government Printer, Lusaka, 1958, p. 3.

2. Kenneth David Kaunda, HM/35; NAZ-L.

3. Krishnamurthy, B.S., Cha Cha Cha, Zambia's Struggle for Independence; Oxford UP, Lusaka, 1972, File 2 Doc./16

4. NR: Report of Inquiry into Circumstances which gave rise to the making of the Safeguard of Elections and Public Safety Regulations, 1958; p. 7. Government Printer, Lusaka. (Chairman: N.C.A. Ridley); infra, p. 457.

ZANC launched an opposition campaign against the holding of the election under the 1958 Constitution. It put forward its own proposals: adult suffrage for both men and women above the age of 21 years, a Legco composed of 59 members elected directly by the people, three ex-officio members (i.e. the Attorney-General, the Chief Secretary and the Financial Secretary).¹ It also proposed a House of Chiefs.² All these proposals were rejected by the Government. ZANC organized country-wide disturbances, held unauthorized public meetings and processions and called for the boycott of shops and beerhalls.³ Consequently, the authorities banned ZANC under the provisions of the Societies Ordinance, 1957⁴ and placed its entire leadership under restrictions orders under Reg. 3 of the Safeguard of Elections and Public Safety Regulations, 1959, made under the Emergency Powers Ordinance, 1927⁵ as amended by the Emergency Powers (Amendment) Ordinance, 1959.⁶ The colonial administrators justified the invocation of these legal powers on the ground that ZANC leadership had vowed to defy the law and had made it known that unauthorized public meetings would be held to protect against the 1958 Constitution, e.g. the ZANC leader was reported to have told an unauthorized ZANC rally that such rallies would continue to be held:

We shall do this whenever permission is refused to us and granted to all other political parties in the Territory.⁷

Kaunda was detained at Kabompo, North-Western Province of NR.

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| 1. UNIP: | <u>ZANC Proposals for Constitutional Reform for the Protectorate of Northern Rhodesia as Submitted by Zambia to the British Imperial Government u.f.s. the Governor of the Protectorate of Northern Rhodesia, 4th February, 1959; signed K.D. Kaunda, President.</u> |
| 2. | <u>ibid.</u> Arts. 2 and 3. |
| 3. | <u>Infra</u> , p. 96. |
| 4. NR: | 1957, No. 65, secs. 9 and 10, as amended by the Societies (Amendment) Ordinance, 1958, No. 46, which vested the control of societies in the Governor in Council, sec. 3. |
| 5. | 1927, No. 9, Cap. 400. |
| 6. | 1959, No. 9, <u>supra</u> , p. 457. |
| 7. <u>Central African Post</u> , 9th March, 1959: 'Kaunda's Congressmen Defy NR Police', p. 1. | |

His view of his detention and his colleagues' restrictions and prosecution was expressed in a letter he wrote on his 35th birthday (28th April, 1959) 'C/o Detainee Camp, District Commissioner, Kabompo' in which he said, inter alia:

Your know Comrades, that the British will always put slogans at their backs but at the bottom of their hearts it is tough guys they both respect and give consideration for. They will put in jail, they will prosecute them, but all these are tests to see if they are ready to rule because to govern is no small job and need to be handed over to people who can stand the ups and downs of life. British colonialists do not send fools to political prisons - only those they want to try for the job of governing others do they send to political prisons. So you are being tested comrades. I have no doubt that you will pass.¹

Although this was a pep-talk, an exhortation to more courage and activity upon release from restriction, it contains the element that power would be handed over to those who fought for it and not to the people as a whole. This perception of the devolution of governmental power from the Imperial Government to the formerly colonized peoples, have contributed towards the establishment of the One-Party system and certain electoral devices which guarantee political power in the hands of the 'freedom fighters' of the party which 'won' independence.

(c) The 1959 Legco Election: Party Participation.

The NRANC view of the proscription of ZANC and itself left to participate in the 1959 Legco election, was that the Colonial Government had declared a preference and approval of the NRANC. But Nkumbula was not happy with that and felt that by doing so the Governor of NR was trying to kill two birds with one stone "banning ZANC, and at the same time making Nkumbula appear like a political stooge in the eyes of the general public."² The 1959 election was the first in which an

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1. Zambia: Kenneth David Kaunda HM/35; the five-page letter dated 28th April, 1959, was deposited in the NAZ-L by E.H. Sikazwe on 19th April, 1985.
 2. ANC Freedom - Voice of ANC, June, 1959, p. 1; UNIP Library and Archives, Freedom House, Lusaka. On some social aspects of the split, see infra, pp. 346-350.

African political party (the NRANC) participated in NR. The composition of the Legco after the 1959 Election was, UFP (13 members), the Liberal Party (3), the Dominion Party (1), the NRANC (1, its President, Nkumbula) and Independants (4).

(d) UNIP is Formed.

Following the proscription of ZANC, several African political organizations appeared in NR; the following being the major ones, viz

- (a) African United Congress (AUC),
- (b) African National Freedom Movement (ANFM),
- (c) African National Independence Party (ANIP),
- (d) Convention People's Party (CPP),
- (e) African National Democratic Union (ANDU), and
- (f) Zambia African Democratic Union (ZANDU).

The AUC was founded by Dixon Nkokola, then the Vice-President of the NRAMU. The ANFM was founded by Dauti Lawton Yamba, who in the 1930's had formed the Luanshya native welfare society and he was one of the founders of the Federation of Native Welfare Associations and the NRAC in 1946 and 1948, respectively.¹ He was a member of the ARC², the Legco and the Federal Parliament. The AUC and the ANFM merged to form the United National Freedom Party (UNFP). The ANIP was founded by one Paul Kalichini. The UNFP and ANIP merged to form the United National Independence Party (UNIP) on 2nd August, 1959. Graphically, the emergence of UNIP was as follows:-

AUC.....)	----- UNFP -----	} ===== UNIP
ANFM)		
ANIP		
CPP		
ANDU		
ZANDU		

1. Supra, pp. 58 - 64.

2. African Representative Council, a non-statutory body constituted by the Governor in July, 1946, composed of 29 members from the then nine Provinces to advise the Governor on matters affecting Africans: The ARC Constitution, 1946, Clause 11(b). The ARC selected the African members of the Legco and the Federal Parliament.

It is, therefore, not accurate to say that "The Zambia African National Congress which changed its name to United National Independence Party in 1960"¹ because as can be seen from the previous page, UNIP was a merger of several African political organizations. The only tangible link between ZANC and UNIP was that on his release from restriction on 31st January, 1960, Kenneth David Kaunda, the former President of ZANC, was on the same day elected President of UNIP.

The Government of NR acting from the experiences of 1958 - 59 enacted the Preservation of Public Security Ordinance, 1960² which empowered the Governor to prohibit the publication or dissemination of matters considered by him to be prejudicial to public security, the control of assemblies, the restriction of the movements and detention of persons.³ The registration and management of 'societies' was tightened by the requirement that more names and information of office-bearers of societies should be supplied to the Registrar of Societies who was empowered to reject any application for the registration of a society,⁴ e.g. a branch of a society such as UNIP.

In 1960 it had become clear that the ultimate political objective of the African people of NR was self-government. Before the Federation there were changes which showed that the CO intended Africans to participate in the administration of their country, for instance, the introduction of direct African representation in the Legco.⁵ But the introduction of the Federation appeared to most Africans as evidence that African advancement was going to be either interfered with or altogether sabotaged. Paradoxically, the Federation hastened Zambia's independence:

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1. Zimba, L.S., The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: An Historical Comparative Study; Ph.D Thesis, University of London, 1979, p. 74.
 2. NR: 1960, No. 5, Cap. 106, sec. 4.
 3. ibid. secs. 3(2) and 4(2) (b).
 4. Societies (Amendment) Ordinance, 1960, No. 26, sec. 15 inserting a new sec. 32A in the Societies Ordinance, 1957.
 5. Supra, p. 57.

local and international pressure to break it, led the Monckton Commission to recommend that

We have reached the conclusion that Her Majesty's Government should make a declaration of intention to consider a request from the Government of a Territory to secede from the Federation.¹

That in effect spelt the beginning of the end of the Federation.

The role of UNIP from 1960 to Independence involved the dissolution of the Federation and freedom of association and assembly in the struggle to end colonial rule in NR.

(e) Freedom of Association and Assembly.

The enactment of the Societies Ordinance and the Preservation of Public Security Ordinances between 1955 and 1960 and the proscription of ZANC in 1959, did not only demonstrate that there was no freedom of association and assembly in NR during that period, but it also showed the African politicians the government's methods of dealing with political opposition. Under the provisions of the Societies Ordinance,² the Governor could declare any society as unlawful organization,³ and in any area in which a society was declared an unlawful society, it was lawful for any authorized police officer to enter, with or without assistance or using reasonable force for that purpose if necessary, into any place in which he had any reasonable grounds to believe that a meeting of an unlawful society or of persons who were members of an unlawful society was being held or that books of accounts, writings, list of members, banners, seals, insigns, firearms, weapons or other articles which he might have reasonable cause to believe belonged to an unlawful society or to be in any way connected therewith. This legislation showed that

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| 1. UK: | <u>Report of the Advisory Commission of the Review of the Constitution of Rhodesia and Nyasaland, 1960; Cmnd. 1960/1148, p. 101, par. 300.</u>
(Chairman: Viscount Monckton of Brenchley. |
| 2. NR: | 1957, No. 65, Cap. 262, now Cap. 109. |
| 3. | <u>ibid.</u> Sec. 28(2); see Government Notice Nos. 176, 183 and 184 of 1961 declaring UNIP Branches in the Northern Province as unlawful societies. |

the authorities considered African political organization as 'secret' societies warranting constant investigations and searches. Thus in Attorney-General v. Mutemba,¹ the accused was charged with assisting an unlawful society, namely the divisional headquarters, Northern Province, of UNIP following the proscription of the society in the Province. The Federal Supreme Court held that although he was not inside his house when police searches were conducted, he was nevertheless 'found in possession' of the documents seized from his home, whose possession was forbidden by law; the provisions of the Societies Ordinance.

The requirement for a police permit before any political rally, procession or meeting was held, was not intended to merely inform the authorities of such a gathering, but to enable police to attend and record and observe what transpired at the meeting. The assumption was that all such gatherings were subversive hence the requirement that police should be present at all political meetings. In some cases the courts did uphold the right to meet for social purposes, notwithstanding the presence of politicians, without a police permit.² Criticism of the police tactics or the administration of justice, was, however, regarded as a criminal offence if made for purposes of advancing the cause of a political party, in that case UNIP: R. v. Chona.³ In all these cases what was said, written or done was in the furtherance of political agitation for constitutional reforms in NR in particular, and, for the dissolution of the Federation, in general.

(f) Constitutional Changes: Coalition Government.

The UK Government announced constitutional changes in 1961,⁴ which retained the franchise based on income, education and property.

1. (1962) R & N LR 88.

2. Bulawayo v. R. (1962) R & N LR 2.

3. (1962) R & N LR 344.

4. UK: Northern Rhodesia, Proposals for Constitutional Change; Cmnd. 1961/1295, Annexures II and III, p. 11.

The 1961 constitutional reforms and the subsequent Order in Council,¹ provided for a Legco composed as follows, viz

Speaker	1
<u>Ex-Officio members</u>	4
Elected members:	
Higher Franchise (Europeans)	15
Lower Franchise (Africans)	15
National Seats	7
Special National	1

The territory was divided into fifteen higher franchise and fifteen lower franchise constituencies for Europeans and Africans, respectively, each returning one member. Secondly, the territory was divided into seven national-seat constituencies, each returning one member elected by voters registered under the higher or lower franchise in every electoral area that was within or coterminous with that constituency who declared that they wished to vote in the national constituencies.² Thirdly, the territory was formed into one national constituency in which higher and lower franchise voters who were Asians or Coloured, voted.³ A 'Coloured' person was defined as a 'person who is not ordinarily accepted as either a European, an African or an Asian'.⁴ The franchise which was based on income, property, education and holding of public office,⁵ was the Federal franchise;⁶ which caused the split in NRANC, the proscription of ZANC and the birth of UNIP. The only real change in 1962 was the increase in the seats for Africans. UNIP unlike ZANC, decided to participate in the 1962 election. Six political parties put up candidates and there were four independants. The results were UNIP 14 (2 on the higher roll and 12 on the lower roll), UFP, 17 (13 on higher roll and 4 National), and NRANC 7 (3 lower roll and 4 National). The Liberal Party, Rhodesia Republican Party, Barotse National Party and four independants were

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1. UK: Northern Rhodesia (Constitution) Order in Council, 1962, S.I. 1962/1874.
 2. ibid. sec. 34(1)(c).
 3. ibid. sec. 34(1)(d).
 4. ibid. sec. 40
 5. ibid. sec. 2, Schedule 2 to the Order.
 6. ibid. sec. 35.

eliminated. However, neither UNIP nor the UFP could form the Government without the support of the NRANC: "The Europeans were delighted, UNIP, they thought, had well and trully failed and the way was now open for a proper coalition between UFP and ANC."¹ This optimism was based on some information that the leader of the NRANC, Nkumbula, had, " 'agreed' - 'off the record', but firmly - to a pact, as long as everything was kept as dark as possible. During the discussion, which took place in greatest 'secrecy', Nkumbula never troubled to hide his dislike of UNIP."² Notwithstanding such alleged pact, the NRANC went into coalition with UNIP, it appears without expressing some regret or apology to the UFP:

Harry did not say sorry to the UFP. He was full of reproaches. It was the UFP's fault that he had failed to win more seats; the UFP had made him unpopular amongst his own people. None of the UFP's great services to the ANC - in money and know-how - were even remotely mentioned.³

The Liberal Party's view of the election result was that NR had moved straight from white supremacy to black supremacy without a period of transition from Colonial rule to African government.⁴ The Nkumbula's move to go into coalition with UNIP has been used as evidence that the people of Zambia always wanted to organize one national party.⁵ However, in those days of struggle for independence - with public intimidation and violence - Nkumbula could not have gone into coalition with a European political party that had brought the Federation which he was publicly fighting against; UNIP was the better devil that the ANC knew.

1. Eeden, Guy van, The Crime of Being White; Nasionale Boekhandel Bekep, Johannesburg, 1965, p. 106.

2. ibid. p. 102.

3. ibid. p. 108

4. Gerald Percy, MSS. Afri. S. 1577 (1958-1962); Northern Rhodesia Liberal Party Newsletter, 8th December, 1962, p. 1; Bodleian Library, Rhodes House, Oxford.

5. Infra, p. 130.

Thus moved into office an African administration¹ dominated by the Governor and his ex-officio members.² The coalition government - with the UFP in Opposition - was said to have been 'torn by dissensions and squabbles'³; however, UNIP and the NRANC, were agreed on two important policies, namely, dissolution of the Federation and self-government for NR. The coalition government was born out of the masses' revolutionary mobilization whose watch-slogan was 'one-man-one-vote'. Constitutional reforms for all British African territories were made in the UK and they were supposed to be based on the basic principle upon which the British Empire stood, 'democracy' and 'freedom'. Although Africans were denied representation in the Legco for so long, the coalition government was evidence that there was freedom in NR. The difficulty for the British in Central Africa was that they had to resist the emergence of white supremacist rule on one hand, and/or African elite domination, on the other hand. When the UK Prime Minister's 'wind of change' blew so strongly in 1960 that 'one-man-one-vote' demand could no longer be resisted, British policy bent to accommodate it. The African nationalists so long scorned became the designated heirs of British power. The problem was how to ensure that self-government did not become a facade for the exploitation of the very masses that fought for one-man-one-vote and freedom: for instance by incorporating the new African rulers into the existing power structures - government decision-making and economic institutions. These problems were left to future constitutional reforms.

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| 1. NR: | <u>UNIP:</u> | K.D. Kaunda | - Local Government |
| | | S.M. Kapwepwe | - African Agriculture |
| | | R.C. Kamanga | - Labour and Mines |
| | <u>NRANC:</u> | H.M. Nkumbula | - African Education |
| | | F.N. Stubbs | - Transport and Works |
| | | C.E. Cousins | - Lands and Natural Resources |
2. Ex-Officio: Chief Secretary, Justice, Finance and Native Affairs: sec. 6(1)(b) Northern Rhodesia (Constitution) Order in Council, 1962.
3. Krishnamurthy, B.S., Cha Cha Cha, Zambia's Struggle for Independence; op. cit., File 2, Doc. 1, p. 5.

(g) Dissolution of the Federation: Independent Zambia.

The Monckton Commission's recommendation that a Government of any of the territories of the Federation could request to secede from the Federation had a condition attached to it, namely that such a request for secession should be related to the attainment of a certain stage of constitutional advance in the Territory itself in order that the secession was thereby linked to an expression of the wishes of the inhabitants made through a proper constitutional machinery.¹ That was in accordance with the British democracy. The assumption of office in Nyasaland and NR by African political parties in 1962 signalled the possibility of applications for secession being lodged with H.M. Government by the Governments of these two Territories. The UK Government, however, on the 8th May, 1963, announced its intention to dissolve the Federation. Accordingly, the Rhodesia and Nyasaland Act, 1963,² provided that H.M. may by Order in Council provide for the dissolution of the Federation with consequential distribution of the functions of the Federal Government among the legislatures of the previously federated territories. Most of these functions were those concerned with 'European affairs' because most of the 'African affairs' were retained by the territorial governments. The Federation of Rhodesia and Nyasaland Order in Council, 1963,³ provided that in pursuance with the provisions of sec. 1 of the Rhodesia and Nyasaland Act, 1963, aforesaid, the power of the legislature of the Federation to make laws would cease on the appointed date with respect to matters described in the Second Schedule to the Constitution of the Federation and that these would revert to the Territorial Governments.⁴

The 'appointed day' covered a number of dates beginning

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1. UK: Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland, 1960, Cmd. 1960/1148, p. 101.
 2. 1963 c. 34.
 3. S.I. 1963/1635; infra, p. 146.
 4. ibid. sec. 1.

with the 1st of October, 1963, the coming into force of the Order, and, ending with the dissolution of the Federation effected by the Federation of Rhodesia and Nyasaland (Dissolution) Order in Council, 1963,¹ which provided, inter alia, that the Federation should be dissolved before 1st January, 1964, and that the Constitution of the Federation would then cease to have effect,² except for the continuation and adaptation of existing laws,³ the liquidation agency, constituted by the Inter-Government Committee and its functions,⁴ and, the conclusion of pending legal proceedings.⁵

The phrases 'paramountcy of African interests' and 'racial partnership' went to the root of the problems of the Federation. The former was formulated in 1922 and applied mainly to Kenya.⁶ The policy that when interests of the natives and of those of the immigrant races were in conflict, those of the natives should prevail, could only have worked well if H.M.'s Government in the exercise of her trust on behalf of the African populations, refused to delegate or share that trust to or with the settlers. 'Racial partnership' had an element of H.M.'s Government surrender of her trust to the settlers who were supposed to run the country in partnership with the natives. In the 1950's with the emergence of legislatures dominated by settlers in East and Central Africa, the 'paramountcy of African interests' and 'racial partnership' were considered 'dead'. The dissolution of the Federation, however, showed that 'paramountcy of African interests' was still alive and kicking.

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| 1. UK: | 1963, S.I. 1963/2085. |
| 2. | <u>ibid.</u> sec. 1. |
| 3. | <u>ibid.</u> sec. 2. |
| 4. | <u>ibid.</u> sec. 3, repealed (in Zambia) by sec. 3, Zambezi River Authority Act, 1987, No. 17, replacing the Central African Power Corporation by the Zambezi River Authority. |
| 5. | <u>ibid.</u> <u>loc. cit.</u> , sec. 18. |
| 6. | <u>Memorandum on Indians in Kenya, 1922, Cmnd. 1922/2904, Memorandum on Native Policy in East Africa, 1930, Cmnd. 1930/3573, and Correspondence regard to Native Policy in Northern Rhodesia; Cmnd. 1930/3731, p. 2.</u> |

Although African political parties had to wage prolonged freedom struggles against colonial rule, particularly in East and Central Africa, the concept of 'paramountcy of African interests' contained an element of decolonization and self-rule for the colonial peoples. Accordingly, H.M.'s Government at the same time they were orderly dismantling the Federation, announced a new Constitution for NR,¹ with a Legislative Assembly composed as follows, viz -

Speaker	
Main Roll Constituencies	65
Reserved Roll Constituencies	10

Her Majesty's Government's view was that a 'Bill of Rights' was necessary to protect minority interests particularly in the event of the establishment of a One-Party system in NR (Zambia):

Whereas in a developed homogeneous country such as Britain, the protection of minority interests is maintained by certain recognised and traditional conventions, in under-developed and mixed communities special provisions are needed for this purpose, and it has been usual in Commonwealth countries to enact by law safeguards which in Britain are a matter of custom only. Without such safeguards a mass electorate, dominated by a single party, might control all the organs of Government, and minority interests could be completely disregarded.²

In a country which is not fully developed and a society which is not homogeneous, a Bill of Rights is essential to safeguard sectional and individual rights and interests. The Bill of Rights was not, however, tailored for the particular situation in NR, but based on European ideas as tried in West Africa.³ The Bill of Rights provided for the protection of fundamental rights and freedoms of the individual, which included the freedom to form and/or belong to, political parties.

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1. UK: Northern Rhodesia (Constitution) Order in Council, 1963, S.I. 1963/2088, came into force on 3rd January, 1964.
 2. Northern Rhodesia: Proposals for Constitutional Change; Cmnd. 1961/1295; Colonial Secretary Iain Macloed, opening NR Constitutional Conference in London, 19th December, 1960; p. 3.
 3. Aiche, D.O., "Neo-Nigerian Human Rights in Zambia", ZLJ, Vol. 3 & 4, 1971 and 1972, No. 1 & 2, p. 43.

The inclusion of the Bill of Rights was in line with UNIP's declared policy to the effect that the future Constitution of NR "shall contain fundamental safeguards guaranteeing the freedom of the individual and providing against abuse of power by the Executive."¹ That policy of the Party was influenced by the Africans' experiences under colonial rule.

The other outstanding features of the Constitution were the office of the Prime Minister and a Constitutional Council. The Constitutional Council's main functions included the determination whether any draft Bill or S.I., if enacted or made, might be inconsistent with the provisions of the Bill of Rights² as contained in the Constitution. It was in this regard that the Constitution made reference to political parties by providing that the Constitutional Council should be composed of representatives from all parties represented in the Legislative Assembly.³ The vote for the purposes of the election of the Main Constituencies' representatives, was granted to all citizens of NR above the age of twenty-one years; thus ending the episode of the fight for 'one-man-one-vote' which began in earnest in 1948. The election of the ten Reserved Roll members of the Legislative Assembly was left mainly to European voters and political parties.

In the election for the Legislative Assembly held in January, 1964, UNIP secured 55 seats and the NRANC 10 seats. Twenty-four of UNIP's 55 seats were gained unopposed.⁴ All the ten Reserved Roll seats were won by the NPP, the former UFP. Following this victory, Kenneth David Kaunda, leader of UNIP, was sworn-in as the first Prime Minister of NR. On the 5th of May, 1964, the final constitutional conference on NR opened in London attended by the Governor, Sir Evelyn David Hone, a UNIP delegation led by the Prime Minister (K.D. Kaunda), a NRANC delegation led

1. UNIP: When UNIP become Government; 1960, p. 5.

2. UK: Northern Rhodesia (Constitution) Order in Council, 1963, op. cit., sec. 17(1).

3. ibid. sec. 17(2).

4. Northern News, 30th December, 1963.

by H.M. Nkumbula and a NPP delegation led by John Roberts. That conference agreed on a new Constitution for a Republic of Zambia, the continuation of the Legislative Assembly and the election of the first President of Zambia. Notwithstanding the adoption of a new Constitution, persons elected under the 1963 Constitution were deemed to have been elected under the 1964 Constitution and continued as members of the National Assembly.¹ In pursuance with the Regulations made by the Governor under sec. 4 of the Zambia (Election of the First President) Order in Council, 1964,² the Prime Minister was elected by members of the Legislative Assembly, as the first President of Zambia. The name 'Northern Rhodesia' given legal recognition by Art. 4 of the Northern Rhodesia Order in Council, 1911, was dropped and it was provided that

The territories which immediately, before the appointed day are comprised in Northern Rhodesia shall cease to be a protectorate and shall together become an Independent Republic under the name of Zambia, and after that day Her Majesty shall have no jurisdiction over those territories.³

Kenneth David Kaunda was accordingly named as the First President of Zambia in and by the Constitution.⁴ The last Ordinance of NR signed by the last Governor of NR was the Acts of Parliament Ordinance, 1964,⁵ on the 19th October, 1964, which came into force on the 22nd of that month, that was two days before Independence. Thus, at midnight of the appointed day, 24th October, 1964, the Princess Royal, handed the Instrument of Independence of the Republic of Zambia, to Kenneth David Kaunda, the President of UNIP and of the Republic of Zambia. Thus ended British rule which began in 1890's.

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1. UK: Zambia Independence Order, 1964, S.I. 1964/1652, sec. 10(1)(a) and (b).
 2. S.I. 1964/1283, 15th August, 1964.
 3. Zambia Independence Act, 1964, c. 65, sec. 1; see also Preamble to the Zambia (Election of the First President) Order in Council, 1964, loc. cit.
 4. Zambia Constitution Order, 1964, loc. cit. sec. 8(1)
 5. NR: 1964, No. 64.

CONCLUSION.

This Chapter has shown that many factors were involved in the delimitation of the region of central Africa which became Zambia, and, in the evolution of its laws and constitution. One of these factors was the importation, first, of English law, and second, of English ideals of a political system. An eminent English jurist has commented that

British administration in overseas countries has conferred no greater benefit than English law and justice. That may be a trite observation, but I offer no apology. It has been said so often by so many people - as many laymen, as lawyers and perhaps by more Africans than Englishmen - that it must be assumed to be true.¹

There was an importation of English law into NR through Orders Council and local Regulations, Proclamations and Ordinances.² There were two major objects of the importation of English law into those parts of Africa under British colonial administration; first, the extension of common law, the doctrines of equity and statutes which were in force in England on the date the African territory received its legislature. In NR, however, the date of reception of English law was fixed as 17th August, 1911, that was the date when North-Western Rhodesia (and Barotseland) and North-Eastern Rhodesia were amalgamated to form NR. The legislature for NR was established on 1st April, 1924. The legislation for NR between 17th August, 1911 and 1st April, 1924, was in the form of Proclamations of the BSAC High Commissioner who was stationed in South Africa. The law extended to NR was mainly concerned with commercial and personal matters of the English, hence the view that Englishmen took their law with them wherever they went and settled. Secondly, the law was imported for the maintenance

1. Roberts-Wray, "The Adaptation of Imported Law in Africa", 4 JAL, 1960, p. 66.

2. Infra, p. 90.

of order and the establishment of governmental institutions. English law on some aspects of democracy, such as the Representation of the People Acts which provided for a representative political system, did not form a segment of the imported law. Such omission contributed partly to the settlers' rejection in 1918 of the provisions of Art. 13 of the NR Order, 1911, which provided for the constitution of an advisory council composed of wholly nominated officials in preference to an advisory council composed partly of nominated, elected and ex-officio members. The franchise the settlers devised for the election of members of the advisory council in 1918 and which was adopted for the election of members of the Legco in and after 1924, was restrictive in line with the law and practices in the UK and other settled territories. Consequently, few people in Britain could have questioned the rightness or otherwise of restricting the vote to the settlers and denying it to the Africans in NR. The prevailing view was that time was not opportune for either direct African representation or indirect representation through (European) members nominated to represent African interests in the Legco.¹

The termination of BSAC rule in NR in 1924 and the establishment of direct British administration regularized and perfected British jurisdiction but did not lead into a British-type of political party system. The Legco was dominated by nominated and ex-officio members. The vote was not granted to the majority of the inhabitants. The Executive Council was dominated by servants of the Crown. All these factors created some political stresses and strains and provided a basis for political organization. But colonial administration was designed to operate without political parties. The holding of high office in government was secured not through winning an election, but either through employment

1. UK:

Report of the Commission on Closer Union of the Dependencies in Eastern and Central Africa;
January, 1929, Cmnd. 1929/3234, p. 287.

(Chairman: Sir Hilton Young).

in the civil service or nomination by the Governor. In addition to that, ex-officio and nominated members were assigned the most important government departments such as that of the Chief Secretary, or the Attorney-General or Secretary for Native Affairs or Finance or of the representation of African Interests, while 'inferior' departments were allocated to elected members. That had an adverse effect on the early development of party organization or of a political party system.

The proliferation of African political organizations which followed the proscription of ZANC in 1959, was indicative of African political awakening. The formation of the coalition government of UNIP and the NRANC in 1962 and of UNIP's Government in 1964, give the impression that there was freedom of speech, organization and assembly during the colonial period, otherwise how did these political parties conduct their election campaigns. In most African countries more political parties were formed and registered during the colonial era than in the post-independence period. Colonial 'liberalism' towards African political organization, however, only emerged during the dying days of colonial rule. During the peak-hour of colonial rule, lack of freedom of expression, organization and assembly was the rule and not the exception.¹ The colonial rulers' refusal to recognize political parties as 'opposition' or as constituting alternative government, was, to some extent, the catalyst to the One-Party system adopted in a number of African states immediately after achieving independence. The Bill of Rights included in some of the Independence Constitutions, guaranteeing, among other rights, the right to assembly freely and associate with others and in particular to form political parties,² was a weak safeguard of a multi-party system as it came too late and lacked a historical background: historical experience was that of a non-political party system.

1. NR: Societies Ordinance, 1957, No. 48, sec. 13.

2. UK: Zambia Independence Order, 1964, S.I. 1964/1652, Schedule, Sec. 23.

CHAPTER III.

THE LEGAL ENVIRONMENT WITHIN WHICH UNIP OPERATES.

Law and Political Change in Zambia.

Introduction.

A study of the legal aspects of the role of UNIP in Zambia calls for a brief reference to the background of the legal environment within which the Party emerged and operates to-day. English law was introduced in NR through Orders in Council which required, inter alia, that courts of law established in the Region, in their criminal and civil jurisdiction should operate upon the principles of and in conformity with the substance of the law for the time being in force in and for England, and with powers vested in and according to the course of procedure and practices observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdiction and authorities, except so far as such law might be modified by an Order in Council, Regulation or the Queen's Regulations.¹ Such provisions were based on the H.M.'s imperial policy that the basic law to be applied in any region settled by the English people, should be English law. That policy was applied to NR.

(a) Application of English Law in NR: Statutes.

During the period between 1900 and 1924 English statutes were extended to North-Western and North-Eastern Rhodesia and NR through the Imperial Acts Extension Proclamations of the High Commissioner.² The NR Legco also extended English statutes to NR.³ Although in some British administered territories the date of the reception of English laws was determined when a Legco was established, the NR Order, 1911, determined the date of reception as 17th August, 1911,⁴ although the NR Legco

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1. UK: North-Eastern Rhodesia Order in Council, 1900, Art. 21(2).
 2. NR: 1912, No. 11, application of the Copyright Act, 1911, 1 & 2 Geo. 5 c. 46 and No. 4 of 1913, application of the Fugitive Offenders Act, 1881, 44 & 45 Vic. c. 69.
 3. Imperial Acts Extension Ordinance, 1924, No. 4, Cap. 5.
 4. UK: Northern Rhodesia Order in Council, 1911, Art. 21(2).

was not established until 1924. The English statutes extended to NR dealt mainly with such matters as conveyancing, forgery, industrial and provident societies, larceny, bills of exchange, gaming, inheritance, enforcement of contracts and the limitation period. The statutes did not include those dealing with constitutional matters such as the numerous Representation of the People Acts, 1832-1948. Constitutional matters were dealt with through Orders in Council. Consequently, no English statute was extended to NR of a constitutional nature.

The High Court Proclamation¹ and later the High Court Ordinance² provided that all statutes of the Parliament of the UK applied to NR "shall be in force so far as the limits of the local jurisdiction and local circumstances permit"³ but that it was lawful for the courts to construe the same with such verbal alteration, not affecting the substance, as might be necessary to make them applicable to the proceedings before the court. The High Court of NR had full jurisdiction, e.g. in all bankruptcy matters. In order to ascertain the extent of that particular jurisdiction, one was referred to the Imperial Acts Extension Ordinance, 1924.⁴ In terms of sec. 2 of that Ordinance, the UK Bankruptcy Act, 1914, was deemed to be of full force and effect in NR.⁵ However, the phrase that English statutes would apply 'as far as circumstances admit', meant in effect that in certain cases or circumstances statutes of the Parliament of the UK could not be applied in NR in toto without some modification

1. NR: 1913, No. 1.

2. 1933, No. 13, amended by No. 41 of 1960 and No. 25 of 1964, Cap. 50.

3. ibid. sec. 12(1); similar provisions was contained in sec. 14 of the Subordinate Courts Ordinance, 1933, No. 36, Cap. 45.

4. Supra, p. 90

5. In re Alfred Basil Ward (1944) (1943-1944) NR LR 33, per Law, CJ at p. 33.

and that the modification would be decided on the merits of each case.¹ Commenting in a Kenyan case involving the application of such provisions, Lord Denning expressed the view that such provisions should be construed liberally to avoid the application of English law with its refinements, subtleties and technicalities not suited to the local conditions.² English statutes applied to NR did not play any role in the development of political parties mainly because of want of statutes dealing with political organization and political organization was not encouraged anyway. The last NR Legco Ordinance to re-state the law of NR, the English Law (Extent of Application) Ordinance, 1963,³ provided that the following were the sources of the laws of NR, viz:

- (a) the common law; and
- (b) the doctrines of equity; and
- (c) the statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and
- (d) any statute of later date than mentioned in paragraph (c) in force in England, applied to Northern Rhodesia.⁴

The Zambia Independence Order, 1964,⁵ provided that notwithstanding the establishment of the Republic of Zambia and the revocation of the Orders in Council, the existing laws would continue, with such modifications, adaptation, qualifications and exceptions as might be necessary to bring them into conformity with the changed political situation.⁶ But it has been observed that African judges have not taken up the challenge of adapting the received law to the needs of their countries; instead they have followed the received law with

1. Kayela v. Botes (1945) (1945-48) NR LR Vol. 1, 183

2. Nyali v. Attorney-General /1955/ 1 All ER 646 and /1957/ AC 253.

3. NR: 1963, No. 4, Cap. 4

4. ibid. sec. 2.

5. UK: 1964 S.I. 1964/1652.

6. ibid. sec. 4, repealed by secs. 3 and 6 of the Constitution of Zambia Act, 1973, No. 27.

little or no modification at all.¹ In theory, it is plausible to say that courts should turn increasingly to explicit concern with the social, economic and political policies that lie behind all laws as the source of their legal reasoning and as the unifying explanation of the legal principles they apply. In practice, however, it is sometimes difficult for courts to act against the letter of the law. For instance, in The People v. Nkhoma² the accused was charged with bigamy contrary to sec. 16 of the Penal Code and sec. 38 of the Marriage Act, 1918.³ The English law of bigamy was introduced in NR to regulate the marital affairs of the settlers and the 'potentially bigamous' natives were not allowed to contract a marriage under the Marriage Ordinance, aforesaid. After Independence, although the social, economic and political circumstances of the Africans still favoured bigamous marriages, Zambians were allowed to marry under the Marriage Act. Upholding the conviction of the accused, the Court of Appeal observed:

A villager in some remote part of Zambia may be astonished to hear that a Zambian man was punished for marrying two women, but as I have said those who adopt the English law will be dealt accordingly.⁴

The English Law (Extent of Application) Act, is, however, only an enabling Act in that it is only in the absence of any Zambian legislation on any subject that the pre-17th August, 1911 English statutes might be applied in Zambia. There is, prima facie, no likelihood of an English statute dating before 1911 being applied in Zambia dealing with political parties because no such statute exists, or if it existed, it could not be applied in Zambia because of the presence of Zambian legislation regulating political parties; the Societies Act.⁵ The control of political organization through 'societies'

1. Gower, L.C.B., Independent Africa; The Challenge to the Legal Profession; Harvard UP, 1967, p. 96.

2. (1978) ZR 4

3. NR: 1918, No. 10, Cap. 211.

4. loc. cit., per Ngulube, DCJ at p. 6.

5. NR: 1957, No. 65, Cap. 105; supra, p. 70.

was introduced by British administrators in Africa, e.g. in Tanganyika¹ and NR.² After Independence such legislation was retained or fresh one enacted, e.g. in Kenya³ and The Gambia.⁴ Political organization is an area in which English statutes played no role during the colonial era and in which they will not be invoked to-day or in the future.

(b) The Application of Common Law and Equity.

The English Law (Extent of Application) Act, provides that common law and equity in force on the 17th August, 1911, shall be applicable in Zambia; that is that the date of reception applies to statutes, common law and doctrines of equity.⁵ The Interpretation Act, 1964⁶ defines common law to mean 'the Common Law of England'⁷ and this is judge-made law, that is the substantive rules and rules of procedure developed and administered by the English common law courts of Common Pleas, of Exchequer and King's Bench.

The rules administered by these Courts were derived from the general law and customs of the Realm of England. As regards the common law referred to in sec. 2(a) of the English Law (Extent of Application) Act and sec. 3 of the Interpretation Act may mean judge-made law as described above, and/or residuary concepts constituting the real essence of the common law edifice: the right to present one's case in an open court, or freedom of contract, or of assembly and association. In NR, however, the question was not of

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| 1. Tanganyika: | Societies Ordinance, 1954, No. 11. Cap. 337. |
| 2. NR: | Societies Ordinance, 1955, No. 43, Cap. 105. |
| 3. Kenya: | Societies Act, 1968, No. 4. |
| 4. The Gambia: | Societies Act, 1971, No. 5. |
| 5. Allott, A.N., "Authority of English Decisions in Colonial Courts" | <u>JAL</u> , Vol. 1, No. 1, 1957, p. 25. |
| 6. Zambia: | 1964, No. 60. |
| 7. | <u>ibid.</u> sec. 3. Article 138 of the Constitution of Zambia Act, 1973, contains some definitions, however, these do not include such words or phrases as 'law', 'common law' or 'equity. Similarly Art. 2(1) of Cap. 1, Applied Laws, which defines 'existing law' does not define 'common law' or 'equity'. |

the content of common law, but to whom it applied. Did it, for instance, apply to natives? In Rex. v. Petrus Johannes de Jager,¹ the appellant was convicted under sec. 53A of the Penal Code, 1930, for being in possession of prohibited religious books. He contended that under Art. XXI of the NR Order in Council, 1924, the law of NR was to be enforced in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in the UK. He contended further that the prohibition of the books in issue had the effect of denying the natives of NR freedom of conscience and thus repugnant to English law on religious freedom. The judge hearing the appeal observed, inter alia, that

I gather that the case for the Appellant is concerned not so much with its effect on the European element of the population, as with the consequences on the Native inhabitants, and here I pause in uncertainty as to the number of British subjects among them..... Be that as it may, the question arises, what is the statute law of England relating to freedom of religion which may be said to apply by express words or necessary intendment to His Majesty's subjects resident in, or resorting, to this Territory?²

His Lordship made reference to "mass of law bearing generally on the subject of religion" and went on to say that in such matters, it might be taken that, subject to such qualifications as local circumstances might render necessary, "the general effect of these statutes applies by necessary intendment to individuals being His Majesty's subjects in this country."³ The natives of NR were not British subjects or as alternatively put, His Majesty's subjects; they were British Protected Persons. According to the above reasoning, English statutes protecting freedom of religion were not applicable to them: mutatis mutandis was the common law applicable to them? Unlike the the statute law which was required to be applied subject to modification

1. (1935) NR LR 13.

2. ibid. per Francis, J., at p. 22.

3. ibid. at p. 23.

or qualification, there was neither a rule of the common law itself or of statute which required that the common law should be applied in NR subject to local conditions. Accordingly, European political parties emerged and operated without statutory regulation but under common law rules of freedom of expression, association and assembly. Africans also began to organize and form political organization under the common law, that is, without statutory regulation, until 1955 when the Societies Ordinance was enacted: prima facie, that legislation qualified the common law freedom of association for both the natives and the settlers although it was apparently used mainly in controlling African political organization.

One of the difficulties encountered in trying to assess the effect of common law on Africans in NR arises from the fact that a number of common law rules were embodied in legislation. For instance, in R. v. Zulu & Others,¹ the accused, members of the ZANC,² were charged with conspiracy to injure the Ndola Municipal Council in its trade, contrary to sec. 358(4) of the Penal Code, 1930, by urging other people to boycott its beerhalls as protest against the refusal by the Police authorities to allow ZANC to hold a public meeting. Applying the common law, the Magistrate held that the Crown had to prove that the principal object of the accused was to cause the injury complained of, since the evidence disclosed that their intention was to protest against the refusal to hold the meeting and accordingly the accused had no case to answer. On appeal the Federal Court of Appeal held that the law relating to conspiracy to injure a person in his trade was to be found in sec. 358(4) of the Penal Code of NR, that while the principle of legal interpretation of English law applied

1. (1961) R & N LR 645.

2. supra, p. 72.

(as required by sec. 4 of the Penal Code), the substance of the law laid down in the Ordinance was not affected thereby, and, that the immediate purpose of the actions of the accused was to injure the beerhall trade and therefore their ultimate purpose was irrelevant. The case was directed to be remitted to the Magistrate with a direction that the Crown had made out a case sufficient for the accused to answer.

Consequently, political organizations in NR did not enjoy the same freedom 'under the law' as that enjoyed by political parties under the common law in the UK. The view was that the bulk of English law introduced in NR was intended to regulate the affairs of the white settlers, while local legislation was mainly for African administration.¹ The law regulating political organization was, however, unique in that the 'political party' was originally a white settlers' institution, regulated by the common law. It was only when militant African political organization turned the 'political party' into an African institution, that legislation intervened to regulate how that institution should be operated by the Africans. The foundation of the political party in Zambia was the common law. The doctrines of equity cited in sec. 2 of the English Law (Extent of Application) Act, mean in practical terms, the availability in the High Court of equitable remedies such as specific performance, rescission, ratification, injunction. Although doctrines of equity did not play any role in the emergence of political parties in NR, some of these remedies are relevant to political party organization, for instance, an application could be made for an injunction to stop a political party acting illegally or arbitrarily towards the applicant.² The law of Zambia on political organization is a combination of statute law, common law and doctrines of equity. The following section looks at customary law and political parties or organizations.

1. Melland, F.H., In Witch-Bound Africa; Barnes & Boble, 1967, p. 307.

2. Infra, p. 251.

(c) Customary Law and Political Organization.

According to John Austin, law is a rule laid for the guidance of an intelligent being by an intelligent being having power over him.¹ This definition of law implies the existence of a political sovereign who the people in a centrally organized society are in the habit of obeying in fear of sanctions. It is, therefore, not broad enough because it covers mainly penal laws which are backed by sanctions and does not accommodate laws not promulgated by a parliament and/or not backed by sanctions. In order to broaden the definition of law to include law not enacted by a parliament, law has been defined to embrace 'traditional rule of the community; and it is enforced not by sanction prescribed ad hoc by a sovereign, but one that is involved in the beliefs and practices of the community'.² That definition embraces a rule made by a chief in a non-centrally organized political system. Such rules and courts to enforce them existed and still exist in Zambia before and after Independence.³ An all-embracing definition of 'law' is probably that given by A.L. Goodhart: "Law is any rule of human conduct which is recognised as being obligatory".⁴

The Orders in Council which introduced English law and procedures⁵ in NR also provided for the observance of laws and customs of the indigenous peoples unless such laws or customs were repugnant to natural justice or morality, or to any Order made by H.M. in Council, or to any Proclamation made under an Order.⁶ Local legislation was also required to respect native laws or customs.⁷ The term 'customary law' is used to mean a number

1. Austin, J., Lectures on Jurisprudence or Philosophy of Positive Law; Murray, London, 1885, 5th ed., p. 86.

2. Hartland, E.D., Primitive Law; Methuen, 1924, p. 137.

3. Gluckman, M., Judicial Process Among the Barotse of Northern Rhodesia; Manchester UP, 1966, p. 2. See also Wallace, L., "Native Administration in Northern Rhodesia", JMAS, 1922.

4. Goodhart, A.L., "The Importance of Definition of Law"; JAA, Vol. 3, No. 3, 1951.

5. UK: Northern Rhodesia Order in Council, 1911, Art. 21(2).

6. Northern Rhodesia Order in Council, 1924, Art. 36.

7. ibid. Art. 22; BFSP, 1924, Vol. 119, p. 41.

of different things. Often customary law is associated with pre-colonial legal forms and with the modified and/or distorted versions that survived colonial rule. These rules are viewed as 'customary law' for two reasons which, though theoretically independent, are often empirically connected. First, these rules are predominantly oral although some have been reduced to written text. Second, they derive ultimately from social relations and from sources of authority that are not those of the colonial or the neo-colonial state. Accordingly, customary law is a body of rules which are obligatory to or recognized as obligatory by, members of a society. This perception of customary law implies historical continuity.

There are several theories of the origins of customary law. One of these argues that customary law implies historical continuity but that its origins are actually relatively recent and generally accompanied and formed part of colonial domination.¹ The other view sees customary law simply as 'folk law in the process of reception' of ethnic groups allowed to operate under a colonial state after those groups had been incorporated within a larger cultural and social whole.² This view postulates customary law not originating before, but during the colonial era, which is tantamount to implying that Africans had no indigenous laws before the advent of colonialism. The provisions of the Orders in Council cited on the previous page give a clear indication that native laws and customs existed before the advent of colonial rule; hence the requirement that the Courts established by the colonial administrators could obtain the assistance of one or two native assessors, to advise them upon native law and custom although the decision of the Court was given by the Judge or Magistrate.³

1. Snyder, F.G., "Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal"; Journal of Legal Pluralism and Unofficial Law, No. 19, 1981, p. 49.

2. Chanock, M., Law, Custom and Social Order: the Colonial Experience in Malawi and Zambia; Cambridge, 1985, p. 4.

3. UK: Northern Rhodesia Order in Council, 1911, Art. 35; BFSP, 1913, Vo. 106, p. 463.

A distinction should be drawn between 'customary law' and rules enforced by Chiefs and Headmen as agents of the colonial administration, for instance, the control of political organization in their areas. The fact that chiefs were empowered to administer their areas and, consequently, controlled the activities of persons, did not convert such power into rules of native law or custom. The colonial rulers at times confused the situation by e.g., charging those who acted contrary to such administrative rules, as disobeying native authority contrary to native custom.¹ Such 'disobedience' was, in fact, disobedience not of native authority as such, but of colonial authority as exercised by and through the chiefs. Political leaders who appeared before native authority courts charged with the offence of 'showing disrespect or contempt of native authority contrary to native custom' by holding political party meetings without a permit from a Native Authority, were charged under an offence unknown to native law or custom because political party activities were activities of an institution not known to native law: political activities were regulated by legislation, e.g. the Penal Code and the Societies Ordinance.

In Mbowela v. R.² the appellant was convicted by the Sikufela Native Court for summoning an unlawful meeting of UNIP at Sachikutu Village without a permit of the Manyinga Native Authority. A Subordinate Court which re-tried the case, sentenced him to two months imprisonment with hard labour.³ The High Court dismissed his appeal for want of jurisdiction to hear it. The Federal Appeal Court stated that the Subordinate Court had no jurisdiction to try offences against native law or custom under the provisions of the Subordinate Courts Ordinance,⁴ and

1. Chitambala v. The Queen (1957) NR LR Vol. IV, 29.

2. (1962) R. & N LR 112.

3. On recent role of Local Courts see: Singer, N.J., "The Subtlety of legal change: a lesson from Northern Zambia" in Allott, A. and Woodman, G.R., People's Law and State Law: The Bellagio Papers; Foris Publications, Dordrecht, 1985, pp. 109 - 252.

4. NR: 1933, No. 36, Cap. 4, sec. 35(1) (b), now Cap. 45.

that "unwritten native customary law which is not law in the strict sense"¹ could not be the basis for a criminal trial in the subordinate court. The Court accordingly, held that the proceedings in the subordinate court and by the Provincial Commissioner (who had exercised an appellate jurisdiction in the matter) were a nullity. The accused was 'advised' to apply to the High Court for an order of certiorari or a simpler statutory remedy by revision.²

The 'political party' like the 'Christian church' although it quickly took root in the African society, was of foreign import to be regulated not by customary rules, but by common law and statute. If, therefore, African customary rules did not derive their origins and legitimacy from immemorial times but emerged during colonial subjugation, surely the 'political party' should have become an institution known to customary law. After all, both African form of government and colonial rule were hierarchical, restrictive, authoritarian, unchangeable and not subject to alternative government or opposition. That similarity should have made it quite easy to convert the political party into one of those institutions known to customary law. The fact that that did not happen shows that customary rules vis-à-vis political organization are lacking because that institution emerged during the colonial era when most of customary rules had already crystallized.

Customary rules are part and parcel of the law of Zambia although they are assigned a secondary role while the primary roles are allotted to statutory and common laws. Customary rules are not applied to override but to guide how the common law should be applied;³ "in my view Native law is more or less in the same position as foreign law and it must be established by an expert before the courts other than Native Courts".⁴

1. Mbowela v. R. op. cit., per Francis Biggs, FJ, at p. 115(E)

2. ibid. latter procedure provided under Sec. 307, of the NR Criminal Procedure Code, 1936, No. 23, Cap. 7 at trial, now Cap. 160.

3. Komo and Laboho v. Holmes N.O. (1935) SRLR 92

4. Chitambala v. The Queen op. cit., per Somerhough, J., at p. 39.

These views should be contrasted with those expressed by Lord Wright in Laoye and Others v. Oyetunde¹ in which he said, inter alia, that the British Government's policy with regard to African laws and customs was to use them for the purposes of the administration of the country (in this case, Nigeria) in so far as they had not been varied or suspended by statute. The courts established by the British Government had the duty of enforcing native laws and customs so far as they were not 'barbarous', as part of the laws of the land.

In Zambia although a political party system has taken root, if two or more natives had a dispute over the holding of office in UNIP or with regard to property involving the Party, such a dispute would not be settled through customary law but common law. If a native and a non-native had a similar dispute (it was possible, e.g. the former Chief Justice of Zambia, James Skinner, an Irish-Zambian lawyer, was a staunch UNIP member who had won Lusaka East Constituency on the Ordinary Roll in the 1963 Legislative Assembly election to become the Attorney-General at Independence)², the dispute could not be settled through customary law but the common law. Customary law did and does not play any role in the political activities of UNIP.³

(d) The Law of Zambia to-day.

After the achievement of Independence there were changes in the administration of justice in Zambia. There was established a Court of Appeal⁴ and the Judicial Service Commission under the chairmanship of the Chief Justice, to handle the appointment of judicial officers other than Justices of Appeal who were to be appointed by the President. The law

1. /1944/ A.C. 170

2. Supra, p. 85.

3. Infra, p. 391.

4. UK: The Zambia Independence Order, 1964, S.I. 1964/1652, sec. 102 empowered the President to declare the Judicial Committee of the Privy Council as the final court of appeal for Zambia but the President never exercised that power until the Order was repealed by the Constitution of Zambia Act, 1973, No. 27, App. 1, Art. 3.

the Supreme Court, the High Court and the Subordinate Courts are required to enforce is the law developed during the colonial era, referred to as the 'existing law' of Zambia and this includes all law, whether a rule of law or a provision of an Act of Parliament or any other enactment or a S.I. whatsoever (including any Act of Parliament of the UK or Order of H.M.'s in Council) having effect as part of the law of Zambia or part thereof immediately before the commencement of the 1973 Act.¹ The Courts enforce also the Acts of the Parliament of Zambia.

The High Court has an unlimited jurisdiction, except for matters reserved for the IRC² to hear and determine any civil and criminal matter brought under any Act or common law but not customary law³ except in appeal proceedings. Customary law is administered primarily by the Local Courts which also enforce any written laws as are specified by relevant statutory instruments.⁴ Local Courts do not enforce foreign written laws but can apply customary laws of non-Zambian Africans resident in Zambia, e.g. a Zambian court ruled that a non-Zambian (Zimbabwean) resident in Zambia had retained and continued to live by his country's customary law after migrating to and settling in Zambia.⁵

Matters pertaining to the role of UNIP in Zambia have been raised in the High Court, e.g. the torious liability of the Party⁶ or judicial review of the Party's activities.⁷ There has been one major prosecution of UNIP's functionaries - the 'special constables' - for assault commenced in the Subordinate Court.⁸ Local Courts and customary law have so far not been resorted to or invoked, respectively, in the role of UNIP or its leaders.

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1. Zambia: Constitution of Zambia Act, 1973, No. 27, Cap. 1, Applied Laws, Art. 2(1).
 2. ibid. Art. 109(1).
 3. Industrial Relations Act, 1971, No. 36, sec. 92.
 4. Local Courts Act, 1966, No. 20, Cap. 45, sec. 12(b).
 5. Munalo v. Vengesai (1974) ZR 191.
 6. Infra, p. 249.
 7. Infra, p. 251.
 8. The People v. Njanji & Others (1981) Sub./CL/137 (unreported). On the role of the 'Special Constables', infra, p. 392.

CONCLUSION.

The English law and the political party system are among the most outstanding legacies - the other being the English language - of the past colonial era in Zambia. The BSAC Charter initiated a differentiation in the administration of justice in the region by providing that

In the administration of justice to the said people and inhabitants, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to holding, possession, transfer or disposition of lands and goods, and testate or intestate succession thereto, marriages, divorces, legitimacy and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the peoples or inhabitants thereof.¹

Although that provision made no reference to 'political rights' of the inhabitants of the territories referred to, which included to-day's Zambia, it was wide enough to allow for the careful regard being made to any native system of government, including political organization where it existed. The representation in the Legco, following its establishment in 1924 and the emergence of political organization in 1940's were confined to settlers, conducted under Common Law. African political organization did not emerge under customary law; it necessitated the enactment of special legislation to deal with mass mobilization.² Although there was a definition 'Common Law',³ there was no definition of 'customary law'.⁴ The development of parallel legal and party systems for settlers and for the Africans, did not create a dichotomy in the law regulating political parties because both systems were governed by statute and common law. Customary law was irrelevant.

1. UK: BSAC Charter, 29th October, 1889, sec. 14; BFSP, 1889, Vol. LXXXI, p. 301.

2. Supra, p. 68.

3. Supra, p. 94.

4. Ghana: "Customary law as comprised in the laws of Ghana consists of rules of law which by custom are applicable to particular communities in Ghana, not being rules included in the Common Law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application"; Interpretation Act, 1964, CA No. 4, sec. 18(1).

Within the African society, the political organization did not emerge in accordance with any customary or tribal or ethnic rules or laws. Although the African societies were subject to their own customs and laws, the political parties transcended such tribal customs and laws. The political party was a European institution under an African management. It blurred all customary distinctions and differences. It was therefore, inevitable that the appropriate law for the regulation of political organization should be the common law and statute law and not customary law. That was the appropriate arrangement; after all, the African political party in Zambia was born out of the 'detrribalized' African town-dwellers' mobilization of their fellow countrymen and women conducted on the pattern of the European political parties.¹ In any case, with so many different customary laws in the country, it would have proved difficult to organize a national political movement based on and regulated by customary rules.

After achieving Independence, the Zambian society is now divided between the masses in rural areas who depend on traditional subsistence economy and customary laws and cultures in the management of their welfare, and, the commercial-industrial westernized urban dwellers whose personal and economic affairs are in the main regulated by the inherited English law. The applicable law to the central role of UNIP is not the fragmented customary rules, but the common law and statutory law; consequently, the role of the Party cannot be questioned in context of customary law, traditional ethics, ethnic morality, but on grounds provided by English law: common law damages or equitable remedies.² The environment within which the Party operates is therefore, devoid of indigenous checks and balances and accountability.

1. Supra, p. 58.

2. Infra, p. 251.

CHAPTER IV.

PARTICIPATORY DEMOCRACY IN PARTY ORGANIZATION : ELECTION OF NATIONAL LEADERSHIP IN UNIP.

Constitutional Changes to Provide for the Party's Central Role.

Introduction.

It could be contended that at independence Africans inherited a state machinery which was completely alien to the masses and slightly understood by the majority of those in the leadership. After achieving self-rule the freed people were at liberty either to continue the system inherited and legitimize it and make it cease being viewed as a foreign system, or, replace it with their own devised system. In most African countries the Independence Constitution was either repealed or amended: the major changes involved the replacement of a Governor-General and a Parliamentary executive system by a Parliamentary Presidential system, and/or the replacement of a multi-party system by a single-party system.

The Constitutions replaced or amended were in a sense, 'imposed' Constitutions in that in most cases the departing Imperial Power simply asked the decolonized people to 'take or leave it'. The frequent tact of Colonial Secretaries faced with some fundamental disagreements between or among factions represented at a constitutional conference, was to threaten that independence as a whole would be delayed unless agreement or a certain indicated solution was reached. Such threats appear to have been sufficient to achieve at least paper consensus.¹ Majority leaders might have agreed to certain provisions (e.g. entrenched clauses) not out of inner conviction but merely so as to get the independence preliminaries over as quickly as possible, reserving mentally to themselves the right to abandon as soon as possible after Independence those constitutional features which they disliked.

1. Allott, A.N., "Constitutional Change and Political Pressure in some Commonwealth African States: Some Random Reflections", Collected Seminar Papers on Post-Independence Changes, 1967-1969, No. 5, p. 7. See Chand, H. "Sociological Approach to the Study of Constitutional Law" Journal of Indian Law Institute; 1977, Vol. 19, No. 1, p. 5.

The Westminster 'model' of constitution maintains a duality at the apex with one person as Head of State, enjoying no real political power and another as Head of Government, usually called the Prime Minister, wielding the real authority. At independence often the Governor (e.g. Sir Richard Turnbull in Tanganyika) became the Governor-General and as such, the Head of State, representing the Queen and acting on her behalf. The post of Head of Government being assumed by a native (e.g. Julius Nyerere, again, in the case of Tanganyika). Thereafter the political leadership taking the cue from Kwame Nkrumah of Ghana¹ discovered that the British Monarchy was an alien institution and that the Westminster system did not fit in with the African traditions,² decided to have an autochthonous Republican Constitution with an Executive President. Accordingly, in many countries the Independence Constitution was replaced by a Republican Constitution.

The Independence Constitution of Zambia provided for an Executive President who was the Head of State and Government.³ There was a Vice-President, appointed by the President from among members of the National Assembly.⁴ The Cabinet was composed of Ministers appointed by the President who also appointed Junior Ministers from among the members of the National Assembly.⁵ The office of Prime Minister which had existed before Independence (the office existed between January, 1963 and October, 1964), was abolished at Independence. In the absence of the President from the country or during his illness, the Vice-President performed the functions of the President.⁶

The Republican Constitutions - including that of Zambia - did not expressly incorporate the doctrines of the separation of powers

1. Nwabueze, B.O., Presidentialism in Commonwealth Africa; C. Hurst & Co., 1974, p. 16.

2. Nyerere, J.K., letter to the Observer, London, July, 1962, extract reproduced in Nwabueze, B.O., loc. cit., p. 65.

3. UK: Zambia Independence Order, 1964, S.I. 1652, sec. 31.

4. ibid. sec. 41(1).

5. ibid. sec. 44(1).

6. ibid. secs. 37 and 38.

but its functional principles are enshrined in the creation of the three organs of government, namely the Executive, Legislature and the Judiciary. Zambia, even before the introduction of the One-Party system, did not have a Westminster type of 'Parliamentary System' of government nor did it have a 'Presidential system' of the American type because, inter alia, of the Cabinet system based on elected or nominated members of the ruling party. The Zambian President is not constrained by any principles of checks and balances. The President checks and balances the role of the Party.

There is no evidence that at any independence conference there was disagreement on the role of political parties after independence. The role of political parties after independence was one of those matters taken for granted. Seven years after the collapse of political party system in Ghana it was observed that the party was a "novel concept introduced into African public life to meet the needs of modern times cannot be allowed to cause divisions where many divisive factors already exist."¹ In the context of this perception, there were three main systems of government an independent state could adopt: a reversion to the pre-colonial non-political party system, or a full-fledged competitive party system, or, a one-party system. Each of these systems is being tried in one or the other of the African states. The Kingdom of Swaziland opted for a constitutional monarchy and a non-political party system. The Independence Constitution which had provided for a typical model of Westminster system of government based on the monarchy, a Parliamentary and political party system, was suspended and political parties banned. While 'tiny' Swaziland might succeed without political organization, it is difficult for 'populous' Nigeria or Tanzania to be democratically governed without a form of political organization. Nigeria, accordingly,

1. Otuteye, S.C., "Constitutional Innovations in French West Africa - the Experience of Guinea and the Ivory Coast", UGLJ, Vol. X, 1973, pp. 33-34.

opted for a multi-party system contending that

Single party - nothing needs to be said about this. Our society is too heterogeneous and the apparent necessity for the creation of a successful one party state is too ill developed for this to be a viable option.¹

Tanzania, on the other hand, opted for a one-party system of government because

Where there is one party and that party is identified with the nation as a whole, the foundations of democracy are firmer than they can be where you have two or more political parties each representing one section of the community.²

Following the suspension of the multi-party Constitution of Nigeria on the 31st December, 1983, it was reported that the Nigerian military rulers had set up a committee to consider the introduction of a one-party in Nigeria when the country returns to civilian rule in the 1990's.³ On the other hand, Nyerere after retiring as President of Tanzania though continuing as Chairman of CCM, expressed some doubts of the one-party system accusing it of encouraging complacency in the leadership.⁴ This dramatic switch in the positions between the Nigerians⁵ and the Tanzanians, reveals an African dilemma with regard the role of political party or parties in government. The difficult does not lie in the fact that the political party is a foreign importation into Africa, but that it has been used as a tool of undemocratic rule by those in its leadership. The political party, like the motor vehicle, has become part and parcel of the African culture: both imported from abroad.

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1. Nigeria: Report of the Constitution Drafting Committee, Vol. II, 1976; p. 176. Federal Government Information Ministry, Lagos, 1976.
(Chairman: Chief F.R.A. Williams).
 2. Nyerere, J.K., "Democracy and the Party System", being a speech by Nyerere delivered on 14th January, 1963, and published in Tanganyika Standard, 16th-18th January, 1963.
 3. The Times (of London), 5th March, 1986: "Now Nigeria looks for an African answer", report by Andrew Jaspan.
 4. The Guardian (UK), 11th June, 1986: "Nyerere doubts on one-party system", p. 7. Doubts expressed during a visit to Lusaka, Zambia.
 5. In May, 1989, it was announced that only two parties will be allowed in Nigeria when the country returns to civilian rule.

The origins of rule by one dominant political party are traceable in the communist countries. Notwithstanding the African countries' claim that the Westminster 'model' with its multi-party system, was alien to Africa, the one-party system is also an alien system as its origin shows.

(i) Party System in Communist Countries.

The origins of the single dominant party system in communist countries are traceable to Art. 126 of the 1936 Constitution of the USSR which guaranteed to the Soviet citizens the right to unite in the Communist Party which was defined as the 'leading core of all organisations of the working people, both governmental and non-governmental'. Similar provisions naming the local community party as the 'leading core of the working people' appeared in the Constitutions of the satellite states of the USSR: e.g. Mongolia (Art. 82, 1940), Rumania (Art. 86, 1952), Albania (Art. 21, 1964), Bulgaria (Art. 80, 1971), Yugoslavia (Art. 314, 1974) Germany Democratic Republic (Art. 65, 1968), Poland (Art. 3, 1976), and Vietnam (Art. 4, 1980).¹

Although these provisions show that the presence of the communist party in each of these countries is institutionalized (under the 1977 USSR Constitution, the Communist Party is recognized under Art. 6), the one-party system in Commonwealth African countries is different from those countries, for instance, most of the communist countries allow other political parties or organizations in addition to the communist party. Thus, the Czechoslovak Constitution refers to the Communist Party as the vanguard of the working people (Art. 4, 1978) and as the leader of the National Front of Czechs and Slovaks (Art. 6) in which social organizations (including the communist party) are united. In Bulgaria the Agrarian Party,² plays a national role

1. Loeber, D.A. (Ed.), Ruling Communist Parties and Their Status Under Law; Martinus Nijhoff Publishers, Dordrecht, 1986, p. 439.

2. Bozhkov, L., and Ninov, S., The Historical Path of the Bulgarian Agrarian Party; B.A.P. Publishing House, Sofia, 1982, p. 28 on the relationship between the Agrarian Party and the Communist Party of Bulgaria.

similar to that of the Fatherland Front of Czechoslovakia. Secondly, while the communist party is a 'vanguard' party, that is, its membership is selective and restricted, the African one-party system is based on mass membership: unrestricted membership open to all citizens. By the early 1980's Marxist-Leninist parties claiming to be vanguard parties, existed in only ten African states,¹ and none of these was in a Commonwealth state. The introduction of the one-party system in Commonwealth African States had some influence from the Eastern Europeans' one dominant party system; however, the African system is literally a single-party one which does not allow any political organization except through the preserved party: 'the Party'.

(ii) French West African States' Influence.

Almost all Independence Constitutions granted by France to her former African territories contained provisions to the effect that political parties or formations should participate in electoral process; that they were created and they exercised their activities in conformity with the law.² However, by mid-1960's, with the exception of the Ivory Coast and Senegal, the rest of the French-speaking countries of West Africa had become de facto single-party systems. By the mid-1970's most of these states were reverting to a controlled multi-party system; only a fixed number of parties - usually three - were allowed in the country, known as tri-partism. At the time that the single-party was first introduced in a Commonwealth African state (in Ghana in 1964), the Central African Republic (1962) and Congo (Brazzaville) (1963) had already institutionalized the one-party system. In some of these States a single-party system was

1. Gromyko, A., Africa Today, Difficulties and Perspectives; African Studies by Soviet Scholars, USSR Academy of Sciences, Moscow, 1983, p. 43.

2. Reyntjens, F., "Recent Development in the Public Law of Francophone African States"; JAL, Autumn, 1986, Vol. 30, No. 2, p. 77.

imposed de jure by the military returning the country to a civilian administration. Since some of these countries had a de jure single-party system before the military seized power, it was possible that their electoral system had some influence on some Commonwealth African states of West Africa, notably Ghana though not Nigeria. Perhaps the most advisable approach to the study of the introduction of the one-party system in any state is to treat each case as unique, though not totally exclusive from outside influence.

At least one thing is certain namely that, with very few exceptions, for instance Botswana, most African countries which achieved Independence after 1960 modified the system of government established at independence. In most cases the changes were introduced in the name of more and meaningful 'democracy'. That did not mean that the Independence Constitution had established undemocratic system of government, but that the 'new' democracy should be a democracy that allowed the people to run their affairs for the benefit of the country as a whole and not for the service of a few who pretended to represent the majority. The One-Party system was resorted to on the assumption that that system of government was more identified with the people 'as a whole' than the multi-party system which was seen as divisive. Paradoxically, the justification for the One-Party system that it resembled African concept of government, that is that in African society the traditional method of conducting affairs was by free discussion, supported more the multi-party system than the One-Party system. In restropective, it would appear that African nationalist leaders were merely opposed to legitimizing the system imposed by the Imperial powers. The One-Party system although it had emerged in Eastern Europe in the 1940's was to Africa something new. The key idea was that that system of government was to be introduced by the Africans themselves and not imposed by a foreign power. The One-Party system is, therefore, a transitional measure.

Section 1. Mode of Adoption of a One-Party System: Constitutional Changes in some Commonwealth African Countries.

In a number of Commonwealth African countries the Independence Constitution was amended and in some cases repealed altogether to achieve one or a combination of the following, ziv, the abolition of regions and regional assemblies, to establish a republican form of government, where that was not granted at independence, to adopt an autochthonous constitution, that is, a constitution without any legal links with any external authority, and, the introduction of a one-party system. This Section is concerned with constitutional changes intended to establish a one-party system. Only brief references will be made to constitutional changes in West, East and Central Africa before considering constitutional changes which brought about UNIP's central role in Zambia.

It is pertinent to point out that while Independence Constitutions of French West African states contained provisions recognizing political parties or formations which were required to operate in accordance with the law, respect the principles of democracy, sovereignty and national unity,¹ Independence Constitutions of Commonwealth African States did not contain similar provisions. The existence and role of political parties was left to be regulated by special statutory provisions² and the common law. Consequently, the mode of adopting a one-party system in the Commonwealth African states meant the insertion of provisions in the Constitution on the lines of Eastern European or French West African states. The amendment or the adoption of a new Constitution providing for a one-party system, was not intended to guarantee respect the principles of democracy, e.g. freedom of assembly and expression, but to restrict all political organization

1. Reyntjens, F., "Recent Development in the Public Law of Francophone African States", JAL, Autumn, 1986, Vol. 30, No. 2, p. 75.

2. NR: Societies Ordinance, 1957, No. 65, Cap. 105; supra, p. 77.

only through the political party designated in and by the Constitution.

The establishment of a de jure one-party system was said to be intended to achieve national unity, more freedom of expression and less opposition. These were secondary objects, the primary objectives were to eliminate contemporary political parties and to frustrate future political opposition. Above all, a de jure one-party system protects the ruling party from disintegration through splitting into smaller political parties.

(a) West Africa.

Ghana was the first among the West African Commonwealth countries to formally adopt a de jure one party system in January, 1964; that was before Zambia became independent. UNIP had strong links with Kwame Nkrumah's CPP in that it had stationed some of its leading cadres, including General Secretary Munukayumbwa Sipalo, in the Bureau of African Affairs in Accra from 1960 to 1962. Ghana's establishment of a one-party system came about following a referendum organized in accordance with the Constitution of Ghana, 1960,¹ which, inter alia, established the Republic, adopted by a Constituent Assembly.² UNIP leadership closely monitored political developments in Ghana, including the overwhelming vote for the introduction of the one-party system.³ The legislation establishing the one-party system clearly shows that the system was intended to eliminate contemporary and future opposition to the CPP:

1A. (1) In conformity with the interests, welfare and aspiration of the people, and in order to develop the organisation and initiative and the political activity of the people, there shall be one national party which shall be the vanguard of the people in their struggle to build a socialist society and which shall be the leading core of all organisations of the people.

(2) The National Party shall be the Convention People's Party.⁴

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1. Ghana: Constitution of Ghana Act, 1960, No. CA 1.
 2. Constituent Assembly and Plebiscite Act, 1960, No. 1.
 3. Rubin, L., The Constitution and Government of Ghana; Sweet & Maxwell, 1964, pp. 9-9A for the voting result.
 4. Ghana: Constitution Act, 1960, Art. 1A as amended by the Constitution (Amendment) Act, 1964, Art. 2.

The language of this provision was obviously borrowed from the Eastern European constitutions, but, the CPP was not a vanguard but mass organization. The Independence Constitution of Ghana,¹ and the Republican constitution adopted in 1960, aforementioned, unlike the Independence Constitution of Zambia,² did not contain Fundamental rights and freedoms of the Individual (Bill of Rights) provisions guaranteeing, inter alia, freedom to assembly and association and in particular to form and/or belong to political parties. Instead, a person upon assuming the office of President of Ghana was required to undertake his responsibility to the people by making a solemn declaration 'before the people'.³ The declaration was not a limitation on the powers of the President or Parliament which consisted of the President and the National Assembly. Accordingly, the Supreme Court of Ghana held in In re Bafour Osei Akoto,⁴ that the President's declaration affirming his adherence to certain fundamental principles, imposed merely moral obligations on the President and did not restrict his (detention) powers or the legislature's legal powers.

In the absence of a Bill of Rights and opposition political parties, the President of Ghana, through the only allowed political party, the CPP "gathered to himself the supreme power in the state, erecting himself above the legislature and the party, and had then proceeded to use this absolute power to tyrannize and oppress people by a systematic desecration of their civil liberties."⁵ Although it might be said that it was partly due to the absence of adequate constitutional and other safeguards on the resultant power structure under the One-Party

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1. UK: Ghana (Constitution) Order in Council, 1957, S.I.1957/277
 2. Zambia Independence Order, 1964, S.I. 1964/1652
 3. Ghana: Constitution of Ghana Act, 1960, Art. 13(1).
 4. (1961) GLR 523.
 5. Nwabueze, B.O., Presidentialism in Commonwealth Africa; C. Hurst & Co., London, 1974, p. 92.

Constitution of 1964 that accounted for the rule of terror and oppression in Ghana, though in those situations where there are safeguards, the dominant position of the president under a one-party rule could result in abuse of power particularly in detention matters. The dominant role of both the CPP and the President in Ghana ended when the Constitution was suspended,¹ and was declared that "the party known as the 'Convention People's Party' is dissolved and the membership of that party is prohibited."² A subsequent multi-party Constitution was also suspended by the armed forces who have continued to rule the country.

(b) East Africa.

Tanzania's TANU and latter CCM have had close links with UNIP; the latter's leading cadres were also stationed in Tanganyika during Zambia's struggle for independence. Because Tanzania's mode of the establishment of a one-party system had some influence on Zambia, a more detailed analysis of its constitutional development is given.

Tanganyika was granted a 'Charter of Protection' by the Imperial Germany Government in 1886 as a result of an agreement between that Government and the UK Government over their respective spheres of territorial influence in the region.³ After the First World War, as a Mandated territory, Tanganyika was placed under the UK Government administration which continued under the UN trusteeship system after the Second World War. The UK Government granted Tanganyika independence in 1961.⁴ The Tanganyika Independence Act, 1961, provided that the legislature of Tanganyika could amend the Constitution of Tanganyika in accordance with the provisions of that Constitution.⁵ The manner provided was by means of votes, on both the second and third reading of

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1. Ghana: Proclamation for the Constitution of a National Liberation Council for the Administration Ghana, 26th February, 1966.
 2. ibid. Clause 2(2).
 3. Cole, J.S.R., Tanganyika, the Development of its Laws and Constitution; Stevens & Sons, 1964, p. 6.
 4. UK: Tanganyika (Constitution) Order in Council, 1961, S.I. 1961/2274
 5. 1961, 10 & 11 Eli. 2, c. 1, sec. 30(2)

the relevant bill and of two-thirds support of all the members of the National Assembly. The procedure adopted in the establishment of the Republic in Ghana was followed in Tanganyika for the same purpose. The Constituent Assembly Act, 1962¹ established the Constituent Assembly whose powers were to be exercised through Bills and any Bill passed by the Constituent Assembly "shall become law notwithstanding that the Governor-General has not assented thereto on behalf of Her Majesty, and may be cited as the Act of the Constituent Assembly".² The Assembly enacted the Constitution of Tanganyika Act, 1962³ which provided that "Tanganyika is a Republic".⁴ The Republic of Tanganyika (Consequential Provisions) Act, 1962⁵ provided, inter alia, that the National Assembly established by the Tanganyika (National Assembly) and the Tanganyika (Constitution) Orders in Council, 1961, of the UK, was to be the National Assembly for the purposes of the Republican Constitution.⁶

Tanganyika changed its name to Tanzania following its union with Zanzibar.⁷ In the implementation of the treaty of union, Tanganyika enacted the Union of Tanganyika and Zanzibar Act, 1964⁸ and the United Republic of Tanzania (Declaration of Name) Act, 1964⁹ which declared the name of the union to be United Republic of Tanzania. These legislative activities show that TANU and ASP leadership clearly wanted to change the system of government to something not necessarily of their imagination and liking, but appropriate to their geographical position and political development of their people. On 28th January, 1964, the President of Tanzania (Julius K. Nyerere) appointed a Presidential Commission on the Establishment of a Democratic One Party State in Tanzania. In his guidelines President Nyerere required or directed

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1. Tanganyika: 1962, No. 66, Cap. 492.
 2. ibid. sec. 2(3).
 3. 1962, No. CA 1, Cap. 499.
 4. ibid. sec. 1.
 5. 1962, No. CA 2, Cap. 500.
 6. ibid. sec. 19(1).
 7. 26th April, 1964.

8. Tanzania: 1964, No. 22, Cap. 557 (26th April, 1964).
9. 1964, No. 61, Cap. 573, sec. 2(1). (11th December, 1964).

the Commission to take into account 'the national ethical' principles in their recommendations on the nature of the one-party state system and these included, inter alia, the maintenance of freedom of membership of the one political party to all Tanzanian citizens without regard to opinions on any issue, character or any other matter.¹ A Government Paper No. 1 of 1965 set out the recommendations of the Commission accepted by the Government. The National Committee of TANU and ASP on 5th May, 1965, set up a Committee which drew up **election** rules and a TANU Constitution.

An Interim Constitution of the United Republic was enacted which replaced the Independence Constitution.² This provided that there should be one political party in Tanzania and that pending the union of TANU and ASP (which party would constitute the Party), meanwhile the Party was, for Tanganyika, TANU, and for Zanzibar, ASP. The constitution of TANU but not of ASP was set in the First Schedule to the Interim Constitution with the proviso that it could be amended in accordance with its provisions.³ TANU and ASP were united on 5th February, 1977 to form CCM.⁴ The enactment of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1977,⁵ followed the establishment of CCM and provided that "there shall be one party in Tanzania, and that Party is the Chama Cha Mapinduzi".⁶ Some major changes were made to the Constitution of Tanzania in 1984 which included a Bill of Rights. The one-party system, however, was retained and consolidated. The Constitution now provides that Tanzania is a Democratic Socialist One Party State and that the Party is the CCM which shall have "under this and the constitution of Chama" - Katiba hii na Katiba ya Chama - "a final say on all matters."⁷

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1. Tanzania: Report of the Presidential Commission on the Establishment of a Democratic One Party State; 1965, Appendix IV, Part One, 13 - 15.
 2. 1965, No. 43, Cap. 596 (10th July, 1965).
 3. ibid. Art. 3(1).
 4. CCM constitution, 1977, Preambles (a) and (b), now Preambles (1) and (2) Katiba ya Chama Cha Mapinduzi, 1984: (Constitution of Chama Cha Mapinduzi, 1984).
 5. 1977, No. 2
 6. ibid. sec. 3(1)
 7. Fifth Constitution Amendment Act, 1984, No. 15, Art. 3(2)

The view often expressed that in Tanzania the decision to introduce a one-party state was ostensibly taken because there was no real competitive party system,¹ ignores the fact that there were several political parties in Tanzania which were forced out of existence which if they had been allowed to continue, would have gathered support and strength and provide alternative leadership to CCM's. A number of parties which appeared in the 1960's were harassed out of existence, their leadership was detained or deported and their right to register under the Societies Act, severely restricted.² In fact Tanzania had developed a number of political parties,³ for instance, there were the United Tanganyika Party (UPT) formed in 1958, People's Democratic Party, led by Kasanga Tumbo, the People's Convention Party, led by Samson Mshala, the Nationalist Enterprise Party formed by Hussein Yahaya, the All Muslim (Union) Nationalist Party and the African National Congress led by Zuberi Mtemvu. On 22nd January, 1963, Mtemvu dissolved the Congress and he joined TANU, while Tumbo's People's Democratic Party disintegrated after he "fled to Kenya and his party though not officially struck from the register, became moribund."⁴ It is conceivable that if the one-party state were not established de jure, some of these organizations should have provided opposition to CCM. In fact some had began to merge, for instance, a merger between Mshala's PCP and Yahaya's NEP had resulted in the formation of African Independence Movement. The Presidential Commission accordingly recommended that in a one-party state the threat, actual or potential, from opposition group or groups should disappear, and, no opposition to the ruling political party would be permitted.⁵

1. Howard, R.E., Human Rights in Commonwealth Africa; Rowman & Littlefield Publishers, New Jersey, 1986, p. 140.

2. Pratt, C., The Critical Phase in Tanzania 1945-1966; Nyerere and the Emergence of Socialist Strategy; Cambridge, 1974, p. 187.

3. Shiwi, I.G., The State and the Working People in Tanzania; (Ed.) Codesria Book Series, Dakar, Senegal, 1985, p. 62.

4. Maguire, G.A., Towards 'Uhuru' in Tanzania; Cambridge UP, 1969, p. 338.

5. Tanzania: Presidential Commission on the Establishment of a Democratic One Party State, op. cit., Part Two, Vlll, 36.

Bills of Rights are often linked with the Rule of Law concepts such as the separation of powers, the supremacy of Parliament and the independence of the judiciary, in other words, with a liberal democratic system of government. Tanzanian leaders resisted the inclusion of a Bill of Rights in the Independence Constitution of 1961, the Republican Constitution of 1962 and the Interim Constitution of Tanzania of 1965. The inclusion of a Bill of Rights in any of these Constitutions might not have stopped the implementation of some of the undemocratic decisions such as the introduction of a one-party system which qualified freedom of association and assembly often guaranteed by a Bill of Rights. A Bill of Rights has, however, been introduced by the Fifth Constitutional Amendment Act, 1984;¹ the Bill of Rights itself came into force on the 15th of March, 1988.² The Fifth Amendment's Art. 20(1) provides that

Every person shall be entitled to be free, according to law, to assemble freely and peacefully, to associate with others, to hold and express opinions publicly, and in particular to form or join organizations or associations for the purposes of promoting his or her opinion or interests.

This provision should not be read in isolation but in conjunction with other provisions of the Constitution in particular those of Art. 3 which provides that Tanzania is a One-Party State; accordingly, the provisions of the Fifth Constitutional amendments do not encompass any freedom to form political party or parties other than the designated Party, the CCM. The introduction of the Bill of Rights in Tanzania might be indicative that there are strong social tensions in society brought about either by the one-party system or economic divisions into classes,³

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1. Tanzania: 1984, No. 15, to be read together with the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984, No. 16.
 2. ibid. sec. 3(2) which provides that the Bill of Rights should come into force three years from the commencement of the Act; 15th March, 1985.
 3. Daily News, Wednesday, November 6, 1985 contained a special Julius Nyerere's Retirement Supplement and in his farewell to the nation, said: "We are all members of one tribe or another; they are said to be 123 African tribes in Tanzania, as well as groups of people with ancestry in other countries. But you have never allowed this to matter politically to our economic development."

which probably do not look to the Party in pursuit of their interests. The forces that established the one-party state in 1965 are probably no longer capable of looking after the interests of all the sections of the society, hence, the inclusion of the Bill of Rights in the Constitution to safeguard the citizens' rights from encroachment by institutionalized power. It has been contended that the contemporary question is not whether the one-party system was consonant with the African traditional form of government or

Whether or not the government is subordinate to the Party is a non-issue. The primary question is what class controls the party and/or government. An analysis of the class nature in the Tanzanian Society has been undertaken and it is there stated that it is the Petty-bourgeoisie that dominates both the party and the government.¹

This concurs with the hypothesis made at the beginning of this Section that the one-party system was devised to eliminate existing opposition, frustrate future political organization and to ensure continuous domination by the leaders of the party in power. In Tanzania the one-party system was expected to work smoothly because it was assumed that there were no economic divisions or classes which needed party control or organization to further their interests. The introduction of the Bill of Rights might be indicative of the emergence of social classes in Tanzania and a decline in the effective role of CCM in balancing conflicting interests in society. There is no doubt that if the Bill of Rights had granted the right to form and belong to other political parties, political parties in opposition to CCM would have emerged in Tanzania during and after the 1984 National Assembly General Election.

(c) Central Africa.

In this region the only Commonwealth country to establish a one-party system before Zambia, was Malawi. Unlike Ghana and Tanzania, the Independence Constitution of Malawi, 1964² contained a Bill of Rights which, inter alia, guaranteed freedom to form and belong to political parties. At

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1. Fimbo, G.M., "Land, Socialism and the Law in Tanzania", in Ruhumbika, G., (Ed.) Toward Ujamaa - 20 Years of TANU Leadership; East African Literature Bureau, Nairobi, 1974, p. 215.
 2. UK: Malawi (Constitution) Order in Council, 1964, S.I. 916.

independence Malawi was a de facto one-party state with the MCP holding most of the African seats in the National Assembly. The Government Committee which considered the establishment of a Republic was also asked to consider the question whether Malawi should have a one-party system. The Committee answered the question in the affirmative. The Bill of Rights was excluded from the Republican Constitution on the ground that it were intended to protect the interests of the settler minorities. In Zambia the Bill of Rights was said to be necessary to protect the interests of minorities;¹ however, by 1973 about 32 formerly British administered territories had Bills of Rights.² That shows that a Bill of Rights is a useful instrument in safeguarding human rights in general and not the interests of minorities in particular.

Under the Republican Constitution it is stated that the power of the Republic (declared on the 6th July, 1966) derives from the people of Malawi, and shall, subject to and in accordance with the provisions of the Constitution, be vested in the persons elected by and responsible to the people of Malawi.³ Being a one-party system, the 'supreme' power is vested in the MCP leadership. In the place of the Bill of Rights there were included 'fundamental principles of government' which included the principle that the paramount duty of the government was to safeguard and advance the interests and welfare of the people and that the Government of Malawi 'recognise the sanctity of the personal liberties set out in the United Nations' Charter of Human Rights'.⁴ As regards the party system, the Constitution adopted the standard provisions that

4.(1) There shall be in the Republic of Malawi after the appointed day only one National Party.

(2) The National Party shall be the Malawi Congress Party.⁵

1. Supra, p. 84.

2. Read, J.S., "Bills of Rights in the Third World, Some Commonwealth Experience" Verfassung und Recht in Ubersee, 6 (1973) p. 21. With the adoption of a Bill of Rights in Zimbabwe (Constitution of Zimbabwe Order, 1979, S.I. 1600, secs. 11-25) and Tanzania, supra, p. 120, bring the number to 34 states.

3. Malawi: Constitution, 1966, No. 23, Art. 1(2).

4. ibid. Art. 2(1)(iii)

5. ibid. Art. 4. On the Government Committee's Report See: Government Paper No. 002 of 1965.

The effect of this provision is to debar any freedom of association and assembly except in and by the MCP. Any rights granted by the UN Charter of Human Rights cited in the Constitution do not become enacted by their being so mentioned that they could be enforced under the Constitution. In other words, no Malawian citizen could, for instance, bring a complaint in the Courts of Malawi alleging that any of those rights as enumerated in the Charter of Human Rights was being violated or is likely to be contravened in relation to him. The MCP although it is a 'mass party' the one-party system in Malawi was not instituted after consultation with the masses. No provision is made for policy matters to be democratically and openly considered by all the members of the Party, with information, direction and even selection of leaders flowing from the masses to the leadership at the top. Instead policy and leaders are imposed from the top. The notion appears to be that the people have to be 'led' by the MCP and not participate in its leadership: hence the view that MCP leadership means leadership of the President of the MCP and Malawi.

Section 2. Constitutional Changes in Zambia: Establishment of One-Party Participatory Democracy.

The method by which the one-party system originated in Zambia closely followed the mode adopted in Tanzania. On the 25th of February, 1972, President Kaunda announced at a press conference that the Central Committee of UNIP had decided in favour of a change in the Constitution and directed Government to take appropriate measures and accordingly Cabinet had decided to appoint a National Commission on the establishment of a One-Party Democracy.¹ He also stated that the Central Committee in its study of the subject noted that the public's demand for the establishment of a one-party state "is the fundamental need to preserve unity, strengthen peace and accelerate development in freedom and justice."²

1. Zambia: NCEOPPDZ, Report, 1972, Appendix I, p. 67.

2. ibid. p. 67.

The NCEOPPDZ was duly appointed on the 1st of March, 1972, and among its general terms of reference were to consider changes in

- (a) the Constitution of Zambia;
- (b) the practices and procedures of the Government of the Republic of Zambia; and
- (c) the Constitution of UNIP necessary to bring about a one-party participatory democracy in Zambia.¹

In his terms of reference to the Presidential Commission on the establishment of a one-party state in Tanzania, President Nyerere had stated that it was not the task of the Commission to consider whether Tanzania should be a One-Party State. That decision had already been taken.² The NCEOPPDZ was also told that its terms of reference did not include any discussion of whether or not there ought to be a one-party system in Zambia.³ The role of the Commission was to determine what form of one-party system should be introduced. In Zambia it could not have been claimed that the one-party system was inevitable because of lack of opposition to UNIP, rather, it was said that the detention of opposition leaders and the banning of all political parties other than UNIP was a kind of pre-emptive 'coup' and adroit tact to buy time by a UNIP Government beset by many problems.⁴

The establishment of a One-Party system in Zambia was not easily accomplished as in Tanzania because, unlike Tanzania, Zambia had an active opposition to UNIP, and, the Constitution of Zambia contained a Bill of Rights which, inter alia, protected and guaranteed the right to form or belong to, political parties. First, a brief reference should be made to UNIP and its opposition parties.

(a) UNIP and its Opposition Parties.

Although the subject of the opposition in African systems of government is worn out by constant repetition, a brief reference should

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- 1. Zambia: NCEOPPDZ, Report, 1972, Appendix I, p. 68.
 - 2. Tanzania: Presidential Commission on the Establishment of a Democratic One Party State, 1965, p. 2.
 - 3. Zambia: NCEOPPDZ, Report, 1972, Appendix I, p. 67.
 - 4. Mubako, S.V., "Zambia's Single-Party Constitution - a Search for Unity and Development", ZLJ, 5 (1973), p. 69 and also "Human Rights in a One-Party State", International Commission of Jurists, (1973) p. 48.

be made to UNIP's attitude towards its opposition parties. The general view is that the whole conception of a standing 'Loyal Opposition' is totally alien to African experience:

I do not mean by this that indigeneous African institutions do not countenance opposition and criticism. They do. Nor do I mean that they are necessarily autocratic in the sense that traditional ruler does not have to consult his people and retain their confidence. He generally does. What I mean is that they do not recognise a particular role as to oppose. Nor is this surprising. It is, after all, a very strange notion.¹

Some African leaders accuse African opposition political parties of being 'unconstructive' in their role:

I have risen, Sir, because one point should be placed on record. If there is any justification why opposition parties are regarded as a nuisance in Africa, is that you hardly find a single example of a constructive opposition.²

The gist of the problem, however, is not whether African political leaders can tolerate opposition and criticism or whether opposition parties are 'distructive' or 'destructive', but whether they can tolerate an alternative government. It is the threat of being ousted from office, and not mere verbal opposition per se, that is the main factor for the proscription of opposition political parties. Hence, in Zambia, a threat of combined opposition from the UP and ANC on the eve of the 1968 General Election, led to the proscription of the UP under the provisions of sec. 21(1) of the Societies Act.³ A combination of the former UP supporters and ANC enabled ANC to increase its seats in Parliament to twentythree. The European political party, the NPP (former UFP) which was not in direct opposition to UNIP since sec. 9(2) of the Zambia Independence Order, 1964, had reserved ten seats in Parliament for European until 10th March, 1969, or sooner Parliament was dissolved, was not proscribed but disbanded

1. Gower, L.C.B., Independent Africa; Harvard UP, 1967, p. 61.

2. Zambia: J.M. Mwanakatwe (UNIP) (Kawambwa), Parliamentary Debates, 12th March, 1969, No. 17, p. 1782.

3. Government Supplement Gazette, 14th August, 1968, p. 492.

on its own. In as far as the African opposition political parties were concerned, UNIP had hoped that these could disappear without legislating against them.¹ But such hopes were dashed in 1971 when the former Vice-President of Zambia, Simon M. Kapwepwe, formed the UPP, composed of some men who had played a leading role in the struggle for Independence. Because the party's main support came from one ethnic groups, the Bemba, the party was accused of being 'tribalist' and Kapwepwe who had played a 'national' role in the struggle, was seen as engaged in double-dealing, namely claiming national leadership while leading a 'tribal' party.² The UPP, if it were allowed to continue and consolidate, would have provided not only opposition to UNIP, but an alternative government of Zambia. Consequently, the political scene in Zambia was tense with UNIP supporters calling for detention of UPP leaders, proscription of that party and the introduction of a one-party state.

The competitive political party system developed essentially from liberal-democratic principles. The provisions of Part II (the Bill of Rights) in the Constitution of Zambia was a formal confirmation of these liberal principles. The emergence of the UPP was in accordance with the letter and spirit of the Constitution: it was a legitimate exercise of a democratic right guaranteed by the Constitution. In the context of the developing countries, however, the issue was not the exercise of a democratic right, but the ultimate consequences of the exercise of that right. If the UPP was viewed as a threat to law and order, then the right to form and belong to that party and that party's right to exist, ceased. Accordingly, the UPP on 4th February, 1972, was declared an unlawful organization under the provisions of the Societies Act and a week later Kapwepwe and his

1. UNIP: President K.D. Kaunda, opening UNIP General Conference, Mulungushi, 14th-20th August, 1967.

2. The Two Faces of Kapwepwe, 1972, p. 5.

fellow leaders were placed under restriction orders made under the provisions of the Public Security Regulations, made under the Preservation of Public Security Act.¹ After the UPP experience, the UNIP Government had at least two alternative approaches to adopt towards opposition parties; either to retain the right to form and belong to political organizations provided for and guaranteed by the Constitution of Zambia, or, legislate against formation of political organizations other than UNIP itself. Proscription of political organizations under the provisions of the Societies Act is a clumsy method of dealing with political opposition as colonial experience had shown that banned organizations often re-emerged under same leadership but different names. The announcement by President Kaunda that the Central Committee of UNIP had decided to change the provisions of the Constitution which allowed freedom to form and/or belong to political organizations, showed that the Party opted to bring the One-Party system through legislation as well as proscription. The legislation was, therefore, to achieve two things, first, to eliminate existing political opposition to UNIP, mainly from the ANC, and, second, to frustrate any future emergence of political opposition.

The leader of the ANC, Nkumbula, and his deputy, Nalumino Mundia, were appointed to serve on the National Commission on the Establishment of a One-Party Participatory Democracy but both declined to take their seats on the Commission because they were opposed to the One-Party system. Instead, they instituted legal proceedings against the scheme. In Nkumbula v. Attorney-General,² the petitioner contended that his freedom of expression(i) guaranteed under secs. 13, 22 and 25 (Part III, Fundamental Rights and Freedom of the Individual)³ of the Constitution of Zambia was likely to be hindered under the One-Party system and was incompatible therewith and could no longer

1. Zambia: 1960, No. 5, Cap. 106, sec. 4(2)(a).

2. (1972) ZR 111.

3. UK: Constitution of Zambia Order, 1964, S.I. 1964/1652

be expected to exist, (ii) the petitioner might not express in evidence or in the Commission's deliberations (were he to take his seat upon it) contrary view to the establishment of a one-party system, and, (iii) the appointment of the Commission with terms of reference not to hear expressions of opinion contrary to the introduction of the One-Party system, was in contravention of secs. 13, 22 and 25 of the Constitution. The High Court dismissed the application. On appeal, the matter was narrowed down to the following contentions, viz

1. That the appointment by the President of the Commission under sec. 2 of the Inquiries Act, 1967,¹ was ultra vires and null and void because the matters to be inquired into could not be 'for the Public Welfare' within the meaning of those words as used in the section.
2. That if a One Party State were introduced, the appellant's rights under sec. 23 (freedom of association) were likely to be infringed.

The Court of Appeal in rejecting the first contention, took the view that the power to set up a commission of inquiry if in the opinion of the President it would be for the public welfare, made the matter one for subjective decision of the President. A decision made under a power expressed in such terms is, however, not put beyond challenge; it could be shown that the person vested with the power acted in bad faith or from improper motive or on extraneous considerations or misdirected himself in fact or in law.² The Court found that the President acted within the powers vested in him in setting up the Commission of Inquiry.

On the second contention, the Court referred to sec. 28(1) which stated that if any person alleged that any of the provisions of secs. 13 to 25 (inclusive) had been, was being or was likely to be contravened in relation to him, that person might apply to the High Court for redress. The Court observed that it was not part of the functions of the courts

1. Zambia: 1967, No. 45, Cap. 181.

2. Employment Secretary v. ASLEF (No. 2) /1972/ 2 WLR 1370, per Lord Denning, MR at p. 1390.

3. Zambia: Specified in S.I. No. 46 of 1972, issued under sec. 2, Inquiries Act, 1967; loc. cit.

to issue warnings to the government as to the legality of its proposed actions. The President of the Court of Appeal went on to say:

In my judgement therefore s. 28(1) has no application to legislation of any kind, far less to a proposal to amend Chapter III itself. I entertain no doubt whatever that this section applies only to executive or administrative action, (or, exceptionally, action by a private individual) and that this is so is underlined by the existence of the word "in relation to him".¹

The Court concluded that since no executive or administrative action had been taken in relation to the appellant and that it was not alleged that any such action was threatened, sec. 28 could not be invoked.

This decision was in accord with a decision the court arrived at in a Sierra Leone case. In its 1965-1966 Session, the Parliament of Sierra Leone passed a Resolution to the effect that a one-party system of government be introduced in the country. Consequently, the Government issued a White Paper on the "Proposed Introduction of a Democratic One Party State in Sierra Leone", in which it set down its views about the subject and appointed a one-party committee with the duty of collecting public opinions or views on the type of the one party system.

In Steele and Others v. Attorney-General,² the applicants brought their action under sec. 24(1) of the Sierra Leone Constitution,³ which was worded mutatis mutandis, as sec. 28(1) of the Constitution of Zambia referred to earlier. The petitioners' claim was that the appointment of the one-party committee constituted and was a threat to, infringement of, secs. 12 to 23 (inclusive) (viz the Bill of Rights provisions) of the Constitution, and was specifically in breach of sec. 22 guaranteeing freedom of association and assembly including the right to form and belong to any political party. Unlike in the Zambian case, in

1. Nkumbula v. Attorney-General (1972) ZR 111, per Baron, JP, at p. 214.

2. (1967) African Law Reports, SLI, 1.

3. UK: Sierra Leone (Constitution) Order in Council, 1961, S.I. 1961/741, Second Schedule, whose sec. 16 provided: "Parliament may alter any of the provisions of this Order including this section in the same manner it may alter the provisions of the Sierra Leone Independence Act, 1961." (9 & 10 Eli. c. 16).

the Sierra Leone case the petitioners did not allege infringement of their freedom of expression since the Government had not prohibited people from expressing their views for or against the proposal. The Court's view was expressed by Cole, CJ as follows:

What does s. 24(1) of the Constitution mean? This question is relevant because it is my view that on proper reading of s. 24(1) of the Constitution, the plaintiffs/respondents must allege material facts on which they rely to show that any of the provisions of Ss. 12 to 23 (inclusive) of the Constitution has been, or is being, or is likely to be, contravened in relation to them. In my considered opinion, what that section means is this: To entitle a person to invoke the judicial power of this court, that person must show by allegations of material fact in his pleadings (that) as a result of the legislative or executive acts complained of he has sustained, or is sustaining, or is immediately in danger of sustaining, a direct injury, and this injury is not one of a general nature common to all members of the public.¹

The decisions in these two cases show how little protection the Bill of Rights provisions afford the citizens in the enjoyment of the freedom of expression, association and assembly. In the Nkumbula Case even if the Court had ruled in favour of Nkumbula (which was unlikely in the face of the provisions of the Constitution), a one-party system could still have been achieved by proscribing the ANC and refusing registration of any other political organization under the provisions of the Societies Act. This could have been a costly and inconvenient way of achieving and running a one-party system in that political organizations refused registration could challenge the decision of the Registrar of Societies or the Minister (of Home Affairs) in the High Court.² The convenient way was that of amending the Constitution and introduce a de jure one-party system.

The Constitution (Amendment) (No. 5) Bill, 1972, was moved in Parliament by the then Vice-President, Mainza Chona, who traced the history of African political organization in Zambia from the native welfare societies in 1930's, the formation of NRANC and UNIP-NRANC

1. Steele & Others v. Attorney-General (1967) African Law Reports, SLI, 1 per Cole, CJ, at p. 13.

2. See infra, p. 239, et seq.

coalition Government of 1962-63 and said that the Bill "is designed to bring us all into one nation, one party and one leader".¹ At the time the Bill was being debated, the National Assembly was composed of UNIP (83 members), the ANC (17 members) and 2 independants. The ANC members initially voted against the Bill on the second reading but withdrew from the House on the third reading. On the 13th of December, 1972, President Kaunda ceremoniously assented to the Constitution (Amendment) (No. 5) Act, 1972, on the steps of the High Court Buildings in Lusaka. The amendment provided as follows:-

12.(1) There shall be one and only one political party in Zambia, namely the United National Independence Party (in this Constitution referred to as 'the Party').

(2) Every citizen who complies with the requirements laid down, from time to time, by the constitution of the Party, shall be entitled to become a member of the Party.

(3) Nothing contained in this Constitution shall be construed as to entitle any person to lawfully form or attempt to form any political party or to belong to, or associate, express opinion or to do any other thing in sympathy with such political party or organisation.

In early January, 1973, the Minister of Home Affairs, who is responsible for internal affairs, issued an order in exercise of the powers vested in him by the Societies Act, to the effect that

I have on the 12th January, 1973, cancelled the registration of the ANC headquarters, Lusaka, together with all and singular of its branches in Zambia and whatever name description known on the ground that the society concerned has in my opinion amongst its objects or is in my opinion, likely to pursue or to be used for unlawful purposes.²

UNIP was not the only political party in the post-Independence era to use the law to control or eliminate opposition. In The Gambia, for instance, although a multi-party system has been maintained, law was used by Alhaji Sir Dawda Kairada Jawara's People's Progressive Party (PPP) to control the activities of the National Convention Party

1. Zambia: Parliamentary Debates; 6th December, 1972, No. 31, p. 59.

2. Government Notice, No. 130, 1973, issued under sec. 21(1), Societies Act, 1957, No. 65, Cap. 105, as amended by the Societies (Amendment) Ordinance, 1958, No. 46.

(NCP) and the United Party (UP). During the colonial period, the British used the Penal Code (secs. 63 to 68) in controlling political organizations. Following Independence in 1965,¹ and a Republic in 1970,² the Societies Act, 1971, was passed which defined a 'society' to include any club, company, partnership or association of seven or more persons,³ whatever its nature or object or temporary or permanent. The President was empowered to declare any society - a term which includes political parties - by order in the Gazette, to be an unlawful society or a branch thereof or a class or description of any society which in his opinion was, or, was being used for purposes prejudicial to or incompatible with the interests of the defence of the Republic, public order, public safety, public morality or public health or which was, or was being used for interfering with the rights and freedoms of other persons.⁴ Although the provisions of the Societies Act have been used against opposition parties, the PPP has maintained a multi-party system.

Although the Societies Act of The Gambia, like the Societies Act of Zambia, empowers the President and the Minister, respectively, to declare any society as an unlawful society which in his opinion was used or likely to be used for purposes prejudicial to the interests of the State, the former Act spells out the grounds upon which a society should be declared an unlawful society. An unlawful society is one formed for carrying out any of the following activities, viz encouraging or assisting any person to levy war on the Government or inhabitants of the Gambia, killing or injuring of any person, destroying of property, subverting or promotion of the subversion of Government officials, or

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| 1. UK: | The Gambia Independence Act, 1964 13 Eli. 2 c. 93 and the Gambia Independence Order, 1965, S.I. 135. |
| 2. The Gambia; | The Constitution of the Republic of The Gambia Act, 1970, No. 1, sec. 1, repealing the Gambia Independence Act, 1964 of the UK (sec. 118). |
| 3. | 1971, No. 5, sec. 3 amended by the Societies (Amendment) Act, 1984, No. 19, which reduced the number of persons to two; sec. 2. |
| 4. | 1971, No. 5, sec. 3. |

committing or inciting the commission of acts of violence or intimidation, interfering with or resisting or inciting resistance to the administration of law, and promoting and inciting racial hatred.¹ Any court trying an offence under the Act may order the suspension of the society or prohibit its officers and members from engaging in any of its activities. The Court may also, where it finds that the society was formed for unlawful purposes, make an order declaring any such society to be unlawful, which order it submits to the Minister.² The Minister acting on such a court order, may by order in the Gazette, proscribe such a society.³

Although the Zambian law is not as detailed as the Gambian law, the proscription of the UPP in Zambia could be defended on the ground that that party did incite tribal conflict. The ANC, however, although it was reduced to a provincial party, ~~it~~ did not advocate tribal politics. Its proscription was effected for the elimination of opposition to UNIP. The view of the Chairman of the NCEOPPDZ, Mr Chona, is that the ANC and UNIP were one 'party' and that the two had not differed on principle or policy and that external enemies fostered the rise and activity of the opposition parties in Zambia in an attempt to undermine the unity of the Zambian people.⁴ The truth of the matter, however, was that UNIP simply wanted to eliminate all opposition including that from the ANC. Although principles of democracy - freedom of speech, the right to criticise and propagate against the government and freedom of association and assembly - can be adopted by any nation that chooses to do so,⁵ denial of these rights and freedoms can also be institutionalized. In Zambia the institutionalization of a one-party system was finally effected by the Constitution of Zambia Act, 1973⁶ which President Kaunda ceremoniously assented before 7,000 delegates at UNIP's 7th General Conference. The Zambia Independence Order

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1. The Gambia: Societies (Amendment) Act, 1984, No. 19. sec. 3(4)
 2. ibid. sec. 3(2) and (3).
 3. ibid. sec. 3(4).
 4. Chona, M.M., Appendix 'A', Answer to Queen No. 1; infra, p. 538.
 5. Busia, K.A., The Challenge of Africa; Frederick Praeger, NY, 1962, p. 142
 6. Zambia: 1973, No. 27.

was repealed. The provisions of sec. 12A of the repealed Constitution are now contained in Art. 4 of the 1973 Constitution but without those of sec. 12A(3) which had provided that every Zambian citizen who complied with the requirements of the Constitution of the Party, could join the Party. In its place a new Clause was inserted which provides that

(3) Where any reference to the constitution of the Party is necessary for the purpose of interpreting or construing any provision of this Constitution or any written law or for any other purpose, the text of the constitution of the Party annexed hereto, together with such amendments as may from time to time be made thereto by the Party and published in the Gazette, shall be taken to be the sole authentic text of the constitution of the Party.¹

The provisions contained in the Constitution of Ghana, Tanzania, Malawi and Zambia establishing a one-party system did not establish the one party recognized by such provisions. Often the party is registered under appropriate legislation, for instance, the Societies Act. Secondly, although such provisions expressly prohibit any person to lawfully form or attempt to form a political party or organization, those provisions are not penal provisions: no person who formed or purported to form a political party or organization could be prosecuted under such provisions. However, an interested party could ask the Court for an injunction or a declaration to restrain or to declare such an organization 'unconstitutional'. Accordingly, in Zambia separate legislation had to be enacted to make it unlawful for any person to form or attempt to form a political party or organization other than the Party:

22A. Every society (other than the United National Independence Party) which is a political party or has for its objects or purposes political activity of any kind or assembling, associating, expressing opinion or doing any thing in sympathy with any political party or organisation other than the United National Independence Party, shall be an unlawful society.²

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| 1. Zambia: | Constitution of Zambia Act, 1973, Art. 4 as amended by the Constitution (Amendment) Act, 1975, No. 22. |
| 2. | Societies (Amendment) Act, 1974, No. 9, sec. 3, inserting a new sec. 22A in the Societies Act (1958, No. 65) Cap. 105. |

(b) The Effect of Status on the Functions of UNIP.

The word 'status' means, inter alia, rank, relation to others, importance or superior social position. Does the status of UNIP - that of a 'society' - affect its functions? Could it be argued, for instance, that its status - legal status - is irrelevant to its functions? The status of UNIP affects its role. Such questions as whether a decision of the Central Committee of the Party should prevail over a decision of Cabinet¹ or whether the courts of law should review the activities of organs of the Party, e.g. the Central Committee's vetting of prospective Parliamentary candidates,² are tied up with or only arise because of the status of the Party. The Party cannot perform governmental functions, e.g. register its own Branches, though it is closely identified with the Government administration. That can only be done by a Government official, the Registrar of Societies.

It is important to constantly bear in mind in the study of the role of UNIP the important point that the position of UNIP, its Constitution or functionaries is not the same as, say, those of the parties, constitution or officials under a multi-party system which or who remain outside the administration of the State. In Zambia the Party's functionaries perform both Party and governmental functions, e.g. Provincial MCCs and DGs in local administration. The effect of the status of UNIP on the work of some of its functionaries becomes relevant, e.g. on whether their actions can be investigated by the ombudsman or might be open to judicial review. On the other hand, Party organs might not perform certain functions because of the status of the Party, e.g. sub-Committees' control of parastatal organizations.³

This study is, to a great extent, concerned with the effect of the status of UNIP on the Party's functions. If the legal status of UNIP were a straight-forward matter similar to that of a company registered under the Companies Act,⁴ most of the problems discussed in this study would probably not arise.

1. Infra, p. 190.

2. Infra, p. 280.

3. Infra, p. 367.

4. Zambia: Cap. 868.

Section 3. The Constitution of UNIP's National Organs.

This Section looks at the internal organization of UNIP's organs at the national level and tries to answer the question whether they are democratically constituted. 'Democratically constituted' in this sense means whether Party members effectively participate in the decision-making of these organs. Although in both Tanzania¹ and Zambia² there was substantial assessment of the views of the citizens about the form the One-Party system should take, neither TANU (now the CCM) nor UNIP countenanced any questioning the decision to move from a multi-party to a one-party system. In both countries it could safely be said that the one-party system was imposed by the ruling party.

In most countries democracy is perceived in the context of the presence or the absence of the number of political parties freely operating in the electoral system. There is an assumption that in a democracy, that is a society in which there are several political parties, members of such parties effectively participate in the decision-making of their organizations. In other words, it is assumed that parties in democratic societies are democratically constituted and run. There is also an assumption that the multi-party system, common among the Western European countries, also provides alternative policies and leadership. The single-party system adopted in the Communist countries of Eastern European countries is also regarded there as the basis of a true and popular democracy based upon the people acting for the people. Each of these systems is open to exaggeration as to its merits or demerits.

The One-Party system adopted in Zambia, notwithstanding the absence of opposition political groups, is a coherent system in which discussions and elections are regularly carried out. This Section looks at the mode of the election of the President of the Party and MCCs and safeguards for members' participation in Party activities.

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1. Tanzania: Report of the Presidential Commission on the Establishment of a Democratic One Party State, 1965, Part I, 8.
 2. Zambia: NCEOPPDZ, Report, 1972; p. 68, Appendix I.

(i) Election of the President of the Party.

UNIP is organized hierarchically, that is, from the Section at the grassroots level to the Party Congress, at the top. A Section should have a minimum of five members and ten Sections or fifty members make up a Branch.¹ An average of ten Branches constitute a Ward.² The number of Wards that make up a District is not stipulated in the Party Constitution because the Party Ward is also the civic ward of the District Council.³ Eight of the nine Provinces were delimited by the British Colonial rulers. The ninth province, Lusaka, was curved from the Central Province after Independence. At the national level, the smallest Party organ, the Party Control Commission, is composed of eleven members under an MCC's Chairmanship.⁴ The Central Committee, which meets twice a year, is composed of sixtyeight members.⁵ The National Council, which meets once a year, is the highest policy-making body composed of about fivehundred members,⁶ most of whom are full-time Party functionaries. The Party Congress is the supreme policy-making body which meets once in five years in ordinary session and attended by about seventhousand delegates.⁷

The NCEOPPDZ explicitly recommended that the election of the President should be open to contest,⁸ and that recommendation was accepted by the Government.⁹ Although that principle is enshrined in the Party Constitution,¹⁰ Kaunda has since 1960 been elected unopposed as President of UNIP. Opposition has been frustrated in many ways. The President has consistently demanded that he be popularly elected and resisted UNIP's

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| 1. UNIP: | Constitution, 1988, Arts. 26 and 31, respectively. |
| 2. | <u>ibid.</u> Art. 37. The delimitation is done by UNIP's Electoral Commission, administratively. |
| 3. Zambia: | Local Administration Act, 1980, No. 15, sec. 2. |
| 4. UNIP: | Constitution, <u>loc. cit.</u> , Art. 67(1) (b) |
| 5. | <u>ibid.</u> Art. 56 |
| 6. | <u>ibid.</u> Art. 55 |
| 7. | <u>ibid.</u> Art. 51 |
| 8. Zambia: | NCEOPPDZ, Report, 1972, p. 11 |
| 9. | NCEOPPDZ-SRAG, 1972, p. 4 |
| 10. UNIP: | Constitution, <u>loc. cit.</u> , Art. 73(7) |

'militants'' pressures that he be declared a 'Life-President' on the same pattern as Malawi's and MCP's Life-President, Dr. Ngwazi Kamuzu Banda.¹

Mr Mainza Chona's view is that the suppression of opposition to Kaunda's leadership of UNIP and the Republic of Zambia, is deliberate and is based on the desire that President Kaunda should be treated as a 'father figure' whose leadership should last the first decades of Zambia's post-colonial era.² That view is supported by some of the resolutions of the Party, for instance, the following which stated that

This Council specifically declares as an article of faith the fact that the process of nation building, especially in its early stages, calls for a firm captain at the helm of the ship of state Our inherent political problems and the nature of our geography do not permit us the luxury of either changing the boats or captains in mid-stream.³

Apparently the ship of state is still in mid-stream and the Party has not yet seen it opportune to change the leadership of President Kaunda. His nomination as President of the Party and through that of the Republic, has gone unchallenged since 1960. The purported challenge in 1978 was aborted by a constitutional amendment at the 8th General Conference of the Party. At the 1983 and 1988 General Conference and Party Congress, respectively, Kaunda's nomination as President of UNIP went unchallenged. A person is not qualified to be elected President of UNIP unless he is a fully paid up member for at least five years and he is qualified under the Constitution of Zambia to be elected to the office of President of Zambia.⁴ The Constitution of Zambia requires that a candidate for election to the office of President of Zambia should be

- (a) a citizen of Zambia;
- (b) a member of the Party;
- (c) thirty-five years old or over; and
- (d) otherwise qualified to be elected as a member of the National Assembly.⁵

The Constitution of the Party requires further that the

1. Malawi: Constitution (Amendment) (No. 3) Act, 1970, sec. 2.
 2. Chona, M.M., Appendix 'A', Answer to Question 8, p. 546.
 3. UNIP: National Council, 4th-6th March, 1972, Res. 1.
 4. Constitution, 1988, Art. 73(9).
 5. Zambia: Constitution of Zambia Act, 1973, Art. 38(3).

candidature for the office of President of the Party should be supported by twenty delegates from each Province of Zambia attending the Party Congress. The choice of the presidential candidate is surrounded with some mystery in the sense that it is difficult to determine who actually 'kicks the ball rolling'; whether the presidential candidate himself by asking those around him to nominate him, or an MCC nominates him without such request. Prior to the 1983 presidential election, President Kaunda was reported to have said that

If my colleagues in the leadership of the party and the nation as a whole think I should help, I will help as long as they need my services. But at the moment when they say they do not need my services, I will be happy to go back home. I am a peasant and when I retire I shall go back home to cultivate my fields and grow maize.¹

So far there have been three prominent African Presidents who have retired from office, namely Leopold Senghor of Senegal, Siaka Stevens of Sierra Leone and Julius Nyerere of Tanzania. Stevens and Nyerere, after ceasing to be Presidents of the State, remained Chairmen of the only ruling party in the country, namely the All People's Congress and CCM, respectively. Asked whether he would follow suit and retire from the presidency of the State but retain that of the Party, President Kaunda's reply was that "Tanzania and Zambia are two different countries with different methods",² and that he would only step down from the Presidency if the people asked him to do so and that everyone was free to challenge him at the election. There are two major ways through which the people can 'ask the President to step down', either by voting 'No' in the national presidential election, or, the Central Committee not supporting his candidature. Both are remote possibilities because as Mainza Chona says,³ Kaunda is a father-figure and he is also not closely associated with any tribe in Zambia, the mood in the country has favoured his continued

1. Africa Now; September, 1983, p. 52; interview with Peter Enahoro.

2. Times of Zambia; 22nd July, 1988; 'KK Goes On', p. 1.

3. See Appendix 'A', Answer to Question No. 8, p. 547.

leadership, consequently he has had no difficulty in securing the selection by the Committee of Chairmen as the Presidential Candidate or obtaining the support of twenty delegates from each of the Provinces at the Party Congress.¹

The tendency in most African States has been to allow the first President to remain in office for as long as he receives the support of the people. For example, the Zimbabwe Independence Constitution² has been amended to provide for an Executive President who shall be elected by voters registered on the common roll.³ The first President (Robert Mugabe) was elected by the members of the Senate and the House of Assembly.⁴ The term of office for the President is six years.⁵ There is no limitation as to the number of terms the President may serve. The omission must be deliberate to allow at least the first President to remain in office for as long as he receives the support of the people. The projected merger of ZANU-PF and ZAPU and the establishment of a One-Party system in or after 1990, will also facilitate the entrenchment of the leadership of the President.

In Tanzania after the retirement of the first President Julius Nyerere, the Constitution now provides that the President shall serve a maximum of two five-year terms.⁶ The mode of the election of the President and the duration of his term of office have some bearing on the dominance of the President. A long term leads to complacency; the office-holder being calmly contended and less responsive to people's problems. The Tanzanian development will be closely watched in Zambia and will probably be emulated.⁷

(ii) Election of the MCCs.

Persons wanting to become MCCs indicate their intention to the President who presents their names to the Party Congress after their candidature

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| 1. UNIP: | Constitution, 1988, Art. 73(6) |
| 2. UK: | Zimbabwe Constitution Order, 1979, S.I. 1979/1600 made under the Southern Rhodesia Act, 1979, c. 52 |
| 3. Zimbabwe: | Constitution of Zimbabwe (Amendment) (No. 7) Act, 1987, No. 23, sec. 28(2). |
| 4. | <u>ibid.</u> sec. 21 |
| 5. | <u>ibid.</u> sec. 29(1) |
| 6. Tanzania: | Fifth Constitution Amendment, 1984, No. 15, sec. 40(1) |
| 7. | See M.M. Chona's view, <u>infra</u> , Appendix 'A', p. 546 |

had been approved by the National Council. Before the 1983 General Conference the out-going Central Committee approved the twenty candidates.¹ That system was criticised as it amounted to the Central Committee members choosing themselves. During and after the 1983 Conference, the President presented and presents 'his' list of candidates direct to the National Council for approval. The candidate for the office of MCC should be a Zambian citizen, a paid up member of the Party, has attained the age of twentyone years, ^hliterate in and conversant with the official language and should be a disciplined person without a criminal record.² In addition to that, every candidate is required to declare his assets and liabilities under the Leadership Code.³ The National Council in approving the candidature of the MCCs is required to have regard to the merits of the candidates and the desire to have all parts of Zambia represented in the Central Committee as far as possible.⁴ Prima facie, it is the National Council and not the President that is required to ensure that there is 'tribal balancing' in the Central Committee, though in practice it is the President who is responsible for the composition of the Committee. The National Council can reject the President's nomination, which did occur at the 1973 General Conference when the National Council rejected the inclusion of a woman nominee on 'moral grounds'.

The President presents 'his' list of candidates, including his nominated members and another list of persons who had indicated to him their willingness to serve on the Central Committee but whose candidature he did not support. One of the obvious questions is why not allow the National Council select the candidates to be formally elected by the Party Congress? That would be one method of participatory democracy and a logical thing to do since in any case the Party Congress in reality

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| 1. UNIP: | Constitution, 1973, Art. 53(3) (a) |
| 2. | Constitution, 1978, Art. 50(6), now Art.60(8)
(a) to (3) of the 1988 Constitution. |
| 3. | Constitution, 1988, Art. 18(2) (b) |
| 4. | <u>ibid.</u> Art. 60(4) |

hardly elects the MCCs but merely endorses what the National Council has approved. The reasons for that are that election by the National Council might result in two elections; one in the National Council and the other at the Party Congress, and, secondly, that any contest in the National Council might upset the President's considered and a 'tribally balanced' list, with the consequence that a Province or Provinces might end up without representation on the Central Committee. Consequently, the President's list goes unchallenged.

The Party Congress since it is presented with a compact ready-made Central Committee simply endorses the President's selection: the delegates' vote, expressed by show of hands, is more a show or an expression of their confidence in the President. When the Central Committee was small (25 members) 'tribal balancing' was possible as the composition of the Central Committee elected at the 1983 General Conference shows:

TABLE A: Central Committee Result, 1983.

Province	Sq. Kl. Metres	Population	Old MCCs	New MCCs	Total
Central	94,000	513,835	1	0	1
Copperbelt	31,000	1,248,888	2	0	2
Eastern	69,000	656,381	3	1	4
Luapula	51,000	412,798	1	1	2
Lusaka	22,000	693,894	2	1	3
Northern	148,000	677,894	2	1	3
North-Western	126,000	301,677	2	1	3
Southern	85,000	686,469	3	0	3
Western	126,000	487,988	2	1*	3
9	752,000	5,679,808	18	6	24

Of the twentyfour MCCs elected or nominated at the Party's General Conference in 1983 - the President is the twentyfifth member - four were women, one lawyer, two senior chiefs, two university graduades, one trade unionist and the rest were 'freedom fighters'. Since there is no fixed terms a person might serve on the Central Committee, the freedom fighters have been in the Committee since Independence in 1964 and some even before that date.

* includes the Prime Minister who is an MCC, ex officio.

During the 1988 Party Congress the Central Committee was enlarged from 25 to 68 members.¹ The enlargement did not affect the mode of the election of MCCs as described in this section: of the 68 members, 40 were elected by the Party Congress. The number of the President's nominated members has been increased from 3 to 7.² The President appoints not more than 20 Cabinet Ministers to the Central Committee.³ At the end of a four-and-half hour swearing-in ceremony of the new MCCs and other public officers, President Kaunda explained that all the 68 MCCs were equal and that there was no question of being a permanent or full-time or part-time or co-opted or half-member of the Central Committee: "All are 100 per cent members and each would share equally with the others the collective responsibility of belonging to that organ of the Party".⁴ The enlarged Central Committee which should meet at least twice a year,⁵ now includes the Service Chiefs (the Army Commander, the Air Force Commander and the Inspector-General of Police), trade unionists, parastatal organizations executives and businessmen. The 'old' Central Committee has been converted into the Committee of Chairmen of Committees;⁶ i.e. the ten sub-Committees of the Party.⁷

The election, nomination and appointment to the Central Committee are matters wholly determined by the President. The major role of both the Party Congress and the National Council in the election of the MCCs is a facade designed to legitimize Presidential designs. The enlarged Central Committee entrenches the personal dominance of the President while at the same time spreading responsibility for the failure (or success) of the system to all those in the leadership

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1. UNIP: Constitution, 1988, Art. 57; Daily Mail, 20th August, 1988: 'New MCCs picked: Four Left Out', p. 1.
 2. ibid. Art. 58(1) (c)
 3. ibid. Art. 58(1) (d)
 4. Times of Zambia, 14th September, 1988: 'All MCCs equal'; p. 1.
 5. UNIP: Constitution, loc. cit., Art. 58(2)
 6. ibid. Art. 61
 7. Infra, pp. 217-219.

of the community. The election of the MCCs falls short of both popular candidature and voter participation. The enlarged Central Committee is no longer UNIP's policy-formulating body but a broad-based national convocation. Before the One-Party system was established in Zambia, the perception of a one-party system was as follows, viz

The single party, with few exceptions, has been the end product of a succession of amalgamations in which pre-existing pluralism and competition were not necessarily extinguished, but merely subsumed under a more inclusive organisational label. In effect competing parties within an emergent state often become competing factions within a one-party state.¹

The selection and election of MCCs show that there are no competing 'factions' within UNIP, instead, the President alone balances sectional representation in the Party's top leadership. Consequently, although the Party is a 'mass party', the masses hardly influence the selection of the leaders or the formulation of policies. Under such a system a person is assured of a seat on the Central Committee if he enjoyed the confidence of those in the top leadership, or lose his seat if he lost the support of the same people although he might still enjoy the support of the masses. Although the need to contain ethnic competition was one of the factors in the introduction of the One-Party system in Zambia,² brokerage politics through 'tribal balancing' or institutional representation curtails the emergence of creative leadership and encourages superficial loyalty by the chosen few in the President. Consequently, the system's weaknesses and shortcomings are shielded from scrutiny and criticism lest one loses favours of those in the top leadership.

(iii) Election of the President of the Republic.

The President of the Party in order to become the President of the State requires an affirmative vote of the general electorate. If

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1. Coleman, J.S. and Rosberg, C.G., Political Parties and National Integration in Tropical Africa; Berkeley, 1966, p. 674.
 2. Zambia: NCEOPPDZ, Report, 1972, Appendix I, the One-Party system was expected to preserve unity, strengthen peace and accelerate development in freedom and justice; p. 67.

the electorate votes in favour of the Candidate ('Yes'), he is declared duly elected, or, the electorate votes against him ('No'), in which case he is not declared duly elected. This system can be termed presidential referendum. So far there has been no case of an African Presidential Candidate subjected to such a form of election failing to secure the required 'Yes' votes: the Party goes all the way to ensure a 'Yes' vote. Under the Zambian system there can be no Presidential election contest because the Party Congress elects only one President of the Party.

The subjection of the Presidential Candidate to the 'Yes' or 'No' vote by all the citizens¹ irrespective of their membership of the Party, although it does not provide an alternative choice, affords the people a form of participation in the political life of the country. The election gives the President a sense of legitimacy in his election and term of office. With the decline in the influence of the Party, it is feasible for the electorate to vote against a Presidential Candidate, in which case he ceases to be the President of the Party and the Secretary-General acts as the President,² and the Central Committee appoints one of its members as acting Secretary-General until a new President is elected.³ According to the Constitution of Zambia, however, the office of President of Zambia becomes vacant when the President is removed for a violation of the Constitution or gross misconduct or incapacity or by reason of death or resignation.⁴ In practice, there should either be a President in office or the Presidential Candidate is also the President whenever a Presidential election is held. There is no possibility of the Secretary-General becoming acting President as a consequence of a Presidential Candidate failing being elected President of Zambia. Four Presidential elections have been held in Zambia since Independence.⁵

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| 1. Zambia: | Constitution of Zambia Act, 1973, Art. 38(6) |
| 2. UNIP: | Constitution, 1988, Art. 73(10). |
| 3. | <u>ibid.</u> Art. 73(11). |
| 4. Zambia: | Constitution of Zambia Act, 1973, Arts. 40 and 41. |
| 5. | excluding the election of the first President by the Legislative Assembly under sec. 4 of the Zambia (Election of the First President) Order, 1964, S.I. 1964/1283. |

In the first of the four Presidential elections, Kaunda (UNIP) was challenged by Nkumbula (ANC) under the provision which provided that every valid vote cast in favour of a Parliamentary candidate should be reckoned as a vote for the candidate for President which that Parliamentary candidate supported.¹ That was a classic example of legislation deliberately designed to refuse to give recognition to political parties; otherwise, the contest was between UNIP and ANC Presidential Candidates. Kaunda and UNIP went into the 1964 Parliamentary election with a number of factors in their favour: they were popular and regarded as rightful victors of the dissolution of the Federation and the achievement of independence. The leadership in UNIP was also united in the face of coming independence. The ANC faced a number of disadvantages; reduced to a provincial party and accused of connivance with European political parties. The ANC, however, provided a basis for a competitive election of the President of Zambia in 1964 and in 1968.

The 'Yes' or 'No' election of the President has been used in 1973, 1978, 1983 and 1988. The voter is given two votes (and in the booth there are two ballot boxes), one for or against the Presidential Candidate and the other for the Parliamentary candidate of his choice. Voting is not compulsory: a registered voter can abstain from voting, or vote for or against the Presidential Candidate only, or for the Parliamentary candidate only. The results in Presidential elections between 1968 and 1983 have been as shown in the Table below.

TABLE B: Presidential Election: For or Against Kaunda, 1968 - 1983.²

Year	Registered Voters	'Yes' Votes	'No' Votes	Invalid	Yes %
1968	1,587,966	1,079,972	240,017	63,490	68
1973	1,736,107	581,249	72,995	34,464	86
1978	1,971,883	1,024,954	248,539	45,543	80
1983	2,377,610	1,453,029	70,355	35,670	93

1. UK: Zambia Independence Order, 1964, S.I. 1964/1652, sec. 33(4) (e).

2. Zambia: Compiled from figures contained in Appendix B, of the Presidential and Parliamentary General Election Results, 1983; Elections Office, Lusaka, 1983.

In Tanzania in 1974 Julius Nyerere, as the presidential candidate under a similar system as that followed in Zambia, received 3,462,573 'yes' votes and 109,828 'no' votes and there were 74,388 invalid votes.¹ In 1985 Nyerere's successor as President of Tanzania, Ali Hassan Mwinyi, received 4,778,114 'yes' votes and 215,626 'no' votes and there were 188,125 invalid votes.² The Zambian and Tanzanian presidential results give the impression that the referendum form of election of the Head of State was gaining acceptance by the electorate. In practice, however, the electorate's participation is as a result of massive 'Vote Yes' campaign, rallies and publicity by the Party leadership which is aware of the fact that its own survival and continuity is depended on the presidential candidate obtaining a 'yes' vote. A 'no' vote for the presidential candidate would be a vote of no confidence in the Party as a whole.

Recent constitutional changes in Tanzania which have already spread to other African states, show that the one-party system is still in a transitional formation. The Constitution of CCM provides that the National Conference, which is the equivalent of UNIP's Party Congress, elects the Party Chairman and Vice-Chairman and nominates the presidential candidate for election to the office of President of Tanzania.³ In the past the National Conference elected one person (Nyerere) as the Party Chairman and Presidential Candidate. In 1984 the Conference elected Nyerere as the Party Chairman and Mwinyi, afore-mentioned, was nominated as the presidential candidate.⁴ Accordingly, Nyerere ceased being the President of Tanzania but continued as Chairman of CCM.⁵ He was re-elected Chairman of CCM on 1st November, 1987 for another three-year term of office.⁶ This development shows that CCM leadership is being enlarged

1. Read, J.S., "Tanzania", ASAL, Vol. 1V, 1976, p. 130

2. Figures supplied to the writer by the Tanzanian High Commission, London, 1986.

3. Tanzania: CCM Constitution, Art. 59(6)

4. Presidential election held under secs. 30-35 of Electoral Act, 1984, No. 1, Cap. 111.

5. Ceased being President on 5th November, 1985.

6. The Times (of London), 2nd November, 1987: 'Nyerere Vote', p. 11; elected by 1,878 out of 1,910 votes cast.

and decentralized and, therefore, more open to criticism. Ordinary members of an African political party are often afraid of criticizing party policies or leadership when it is led by the Head of State: in the same manner simple villagers would refrain from criticizing a traditional ruler, at least, in his presence.

In Sierra Leone the once dominant Sierra Leone People's Party (SLPP) lost power to the All People's Congress (APC) in 1967. In June, 1978, a referendum was held whose "result was foregone conclusion, with a massive majority in favour of a one-party system of government. It was clearly rigged, especially in the north, where there were no 'No' votes and 22,864 'Yes' votes more than those actually registered to vote".¹ Seeing that the one-party system was envitable, SLPP MPs crossed the floor and became members of the 'Recognised Party', the APC and the one-party Constitution was adopted.² President Siaka Stevens became the President under the one-party Constitution. In 1985 he retired as the President of Sierra Leone but remained as Chairman of APC. The APC National Delegates' Conference, the equivalent of CCM's National Conference and UNIP's Party Congress, chose Major-General Joseph Momoh, head of the military, as the Presidential Candidate and he was duly elected the President of Sierra Leone on a 'Yes' or 'No' basis and took office on 28th November, 1985. Stevens remained Chairman of the APC. The 10th APC held between 27th-30th January, 1989, abolished the post of party chairman on the ground that the post had been specially created for Stevens who died in June, 1988.³

In Zambia Kaunda has led UNIP since 1960 although his title has had a chequered history. Before Independence the leader of UNIP was called President and soon after Independence, General Secretary. Following the introduction of the One-Party system, he reverted to the title

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1. Riley, S. and Parfitt, T.W., "Party or Masquerade? The All People's Congress of Sierra Leone", JCCP, Vol. XXV, July, 1987, No. 2, p. 172.
 2. Sierra Leone: On control of opposition parties, see Electoral Provisions (Political Parties) Acts, 1971 No. 15, 1972, No. 24 and 1973, No. 27.
 3. Zambia Daily Mail, 1st February, 1989, 'Party chairmanship post abolished,' p. 1.

of President. Between 1959 and 1973 the General Conference elected a chairman who chaired both the General Conference and the National Council. He was, however, subordinate to the General Secretary of the Party. In and after 1973 the General Conference elected the President of the Party who was not chairman of either the General Conference or the National Council. Instead, the National Council elected an ad hoc chairman who presided over the National Council which elected him or any General Conference held during that year of his election.¹ He was, of course, subordinate to the President of the Party. The system worked well and it provided an opportunity to those persons aiming at national leadership to test their popularity by contesting the chairmanship of each of the sessions of the National Council. It also provided the delegates with an opportunity to elect a chairman of their choice. Above all, delegates spoke freely before a conference chaired by one of their own number and choice. The system, however, had some weaknesses, for instance, the ad hoc chairman had no further national or Party duties after the conference. It can, therefore, be argued that UNIP had in fact no chairman. The affairs of the Party were managed by the President and the Secretary-General and Chairmen of sub-Committees.

The 1988 Party Constitution now provides for a standing chairman of the Party,² and President Kaunda assumed both the Presidency and chairmanship of the Party. On the face of it, this was a retrogressive development. The separation in the chairmanship of CCM and the Presidency in Tanzania re-establishes the dichotomy between the Party and the Government. That extenuated the centralization of power in one person as President of the State and Chairman of the Party. The chairmanship of UNIP by the President means further concentration of more power in the President at the expense of the 'supremacy of the Party'.

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1. UNIP: Constitution, 1973, Art. 30(1) and Constitution, 1978, Reg. 76 (b).
 2. Constitution, 1988, Art. 74(b); he chairs the Party Congress, the National Council, the Central Committee and Committee of Chairmen of Committees.

The 1988 constitutional changes in UNIP might be indicative of pending retirement of President Kaunda and to facilitate his remaining Chairman of the Party after relinquishing the presidency of the State on the Tanzanian and Sierra Leonian fashions. There is merit in securing and maintaining a separation of the leadership of the Party and the Government even under a one-party system. There is simply too much concentration of power in the presidency, for instance, all executive power is vested in the President,¹ and he is a component of Parliament.² He is also vested with powers under the Constitution of the Party. There are no checks and balances under the One-Party in as far as internal organization of the Party is concerned. Ideally, there should be room for constructive criticism of the Party by the Government and vice versa. Concentration of power in the President results in a personalized leadership which becomes difficult to criticize or dislodge. With most of the African States failing to run a successful two or multi-party system, a few managing only a one-party system, and the majority going without any form of political organization, at least some effort should be made by those in the leadership to democratize the internal organization of the Party by allowing competitive election, genuine voting system and diversification of the leadership at all levels.

The emerging 'gimmick' whereby former Presidents retain the chairmanship of the ruling party, justifies putting a terms-limit on the number of terms a person may serve as President of a party or a Government, or, an age-limit beyond which a person should not hold the office of President of a party or Government. Although Tanzania has taken a lead by restricting the President of Tanzania to a maximum of two five-year terms,³ Zimbabwe's Constitution is devoid of any provision on terms-limit or age-limit for the President of the State.⁴

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| 1. Zambia: | Constitution of Zambia Act, 1973, Art. 53 |
| 2. | <u>ibid.</u> Art. 63 |
| 3. Tanzania: | Fifth Constitution Amendment Act, 1984, sec. 40(2) |
| 4. Zimbabwe: | Constitution of Zimbabwe (Amendment) Act, 1987, No. 7, secs. 28 and 29; <u>supra</u> , p. 140. |

Section 4. Safeguards of Members' Right to Participate in Party Activities.

Most of UNIP's activities are conducted under the provisions of the Party's Constitution. The formal source of the Party's central role, however, is Art. 4 of the Constitution of Zambia Act, 1973, which legally establishes the One-Party system and directs that all political activity in the country should be conducted under and through this sole political organization. The Party's central role is, therefore, exercised within the ambit of the One-Party State which is governed under its supreme law, the Constitution of Zambia. Although the NCEOPPDZ took time to make its recommendations, the legislation establishing the one-party system, was hurriedly passed.¹ Consequently, there are many aspects of the central role of UNIP that remain unclear and among these are the relationship between the Party organs and public (Government and parastatal) institutions and the safeguards of members' right to participate in Party activities.

Although UNIP holds public meetings and rallies, most of the activities of the Party organs are of a private nature. The proceedings of the Committee of Chairmen and the Central Committee are not open to members of the public. Meetings of the Party Congress and the National Council are also held in camera; members of the public, including the press, are allowed to attend only the formal opening or closing sessions. It is, therefore, difficult to know precisely how much freedom of speech or the right to participate in voting or contesting elections, exists in the central organs of the Party. The Constitution of the Party, however, guarantees members of the Party certain rights and privileges.² This Section considers the question whether the courts of law can review the activities of the Party Congress or the National Council in a bid to safeguard the members' right to participate in Party activities, including standing for election to any office.

1. Zambia: The NCEOPPDZ was appointed on 1st March, 1972, commenced work on 14th March (two weeks later), completed inquiry on 16th June (three months), reported on 15th October (four months); Government accepted recommendations on 14th November (one month) and Bill establishing One-Party system assented to on 13th December, 1972 (one month).

2. UNIP: Constitution, 1988, Art. 24; infra, p. 166.

The legal status of political parties in English-speaking Africa was initially determined by the common law and later by statute, mainly the Penal Code and the Societies Ordinance. The legal effect of registration of a political organization was to make it a 'lawful society' in contradistinction to an unregistered organization which was an unlawful society.¹ In most African states the post-independence upheavals have so far centred around political movements, in particular the ruling political party. On the other hand, it is the political party in power that entrenches itself, for example, through the establishment of a one-party system.

In Zambia although the establishment of the one-party system was challenged in Courts of law,² the challenge did not question the right of the people of Zambia to live under a political system of their own choice. The role of the review of the activities of the Party at its Congress, is not to question whether the one-party system is fair or just, but to ensure that the system once constituted operated in a democratic manner in accordance with its own laid down rules. The function of the courts is often said to be concerned with statutory interpretation and determining whether a person's rights in dispute between him and an administrative organ, exist or do not exist, or have been infringed or not infringed. Although the Constitution of UNIP is not a statutory instrument but merely a 'political document', under the One-Party system it is a little more than a 'political document'; it determines persons' rights to become MPs, MCCs and President of the Party and the Republic. For that reason, the courts' intervention in Party activities is justified. Although courts are bound by statute and must apply any rule under the authority of an Act of Parliament, that does not deter them from applying such important common law presumptions as the rules of natural justice. Consequently, under a written Constitution like that of Zambia, with a Bill of Rights,

1. NR: Societies (Amendment) Ordinance, 1958, No. 46, sec. 12A(4).

2. Supra. pp. 127-128.

the right to personal liberty or the right to participate in the activities of a private organization such as UNIP, can be a matter for a judicial review. The Constitution of Zambia assigns the Party Congress with the duty of electing the President of the Party who becomes the sole Presidential Candidate;¹ prima facie, that provision gives the Party Congress the status and role of a State institution whose function in that regard should be open to review by the courts of law. But this statement should not be construed widely; in fact, the Party remains a 'club' registered under the Societies Act. The courts' intervention may be invoked on the allegation that a Party organ had exceeded its powers or failed to follow a laid down procedure or made an error in application of its regulations or that it had made an unreasonable decision. In the main, however, there should be some identifiable legal fault in the activity of the Party that is in dispute.

In Nkumbula and Kapwepwe v. UNIP,² three major issues emerged. The first was whether the Attorney-General of Zambia could act as Counsel for UNIP, a political party, which under the One-Party system was said to be synonymous with the Government. The second issue was whether UNIP could be cited in litigation by name. The third was whether Party rules adopted by the Party Congress could over-ride provisions of the Constitution of Zambia. What was in issue in this case was whether the applicants who were dissatisfied with the proceedings at the Party Congress could ask the courts to review the deliberations of the Party. The two applicants were former Presidents of the ANC and UPP who had joined UNIP in 1973 and 1977, respectively. Having failed to contest the presidency of UNIP at the Party's 8th General Conference held in August, 1978, they sought court orders declaring that UNIP Constitution adopted at that Conference was not validly adopted and was null and void, and, that the

1. Zambia: Constitution of Zambia Act, 1973, Art. 38(3).

2. (1978) ZR 378.

election of the President of the Party and the sole Presidential Candidate and MCCs held thereunder, were also null and void. Consequently, the subsequent election of the President of the Republic was null and void. Although the Constitution of UNIP allows a contest in the election of the President of the Party, UNIP leadership is opposed to any contest for fear of dividing both the Party and the nation. Accordingly, in 1978 a number of devices were resorted to to frustrate the applicants' attempt to contest the election of President. Their application developed into three separate cases.

In the first case,¹ counsel for the applicants objected to UNIP being represented by the Attorney-General, contending that being a constitutional appointee,² the Attorney-General could not represent a political party, UNIP. He contended that the Party was not established by a legislative enactment and that it was merely a political party, accordingly, it was not proper for the Attorney-General who was employed by the public, paid from public funds, to appear on behalf of UNIP. The decision that UNIP should be represented by the Attorney-General was made by the Party and was well defended by the Attorney-General who contended that under the One-Party system, the Party and the Government were virtually inseparable in identity and that Party identity permeated into the Republican Constitution: the Party and Government could not be separated because if they were, then, the other would not exist. Although the court disagreed with the Attorney-General on this point,³ it decided that the fact that Zambia is a One-Party State, the services of the Attorney-General in certain cases have to be extended to the Party and that the paramount consideration in any such certain cases

1. Nkumbula and Kapwepwe v. UNIP (1978) ZR 378

2. Zambia: appointed by the President under Art. 57(1) of the Constitution of Zambia Act, 1973, in consultation with the Secretary-General of the Party.

3. "But I am not certain that they cannot be legally although they may not appear to be so politically," per Sakala, J., loc. cit., at p. 387.

for the Attorney-General's representation of the Party in any proceedings was State interest. The objection was over-ruled on the ground that the State had an interest in those proceedings since the outcome, should the applicants succeed, would lead to a constitutional crisis. However, it is submitted that the Attorney-General is empowered to intervene in any court proceedings whose possible outcome in his view, might affect State rights, property or interests.¹ That would have been the correct procedure and not to act as counsel for the Party because there were two distinct issues in the proceedings, first, the election of the President of the Party and MCCs at the General Conference, and, second, the election of the President of Zambia by the general electorate. The first was a matter of interest to the Party and the second a matter of interest to the Government. The Attorney-General's interest, strictly speaking, was in the second issue.

The difficult in this case, however, arose from the fact that the Constitution of Zambia requires the Party Congress to produce the sole presidential candidate; to that extent it could be argued that the Party Congress acts under the provisions of the Constitutions of both the Party and the Republic and the Attorney-General is therefore, interested in the election of the President of the Party at the Party Congress. These are some of the effects of the one-party system. In a multi-party system when a party wins an election and forms the Government, the internal organization of the ruling party remains separate from the Government administration. Under the One-Party system constitutional devices are provided which tend to blur the distinction between the Party and the Government. The Attorney-General, however, should remain the chief legal adviser to the Government and not the Party as that would be tantamount to converting the Party into a department of the Government.

In the second case,² there was objection to UNIP, not a legal

1. Zambia: State Proceedings Act, 1965, No. 27, Cap. 92, sec. 31(1) (a), formerly Crown Proceedings Ordinance, 1951, No. 14, secs. 3 and 4.

2. Nkumbula and Kapwepwe v. UNIP (1978) ZR 388

entity being 'sued' in its name. The applicants' contention was that they were not suing the Party in the sense that they were seeking damages but merely cited the Party as respondent. The question whether the courts could 'review' the activities of the Party held at its general conference was not raised: the view being that UNIP is merely a registered society under the Societies Act, a members' club, and as such its activities were amenable to judicial scrutiny. The Court held that it is a settled principle of common law that an unincorporated body has no legal entity capable of suing or being sued, accordingly, UNIP could not be sued in its name, but legal proceedings could be instituted against such a body of persons through representatives. Having noted that the principles of representative proceedings were not rigid but flexible tools in the administration of justice, the Court made the Attorney-General the respondent in a representative (of UNIP) capacity.

This again was a difficult decision. In January of each year UNIP files with the Registrar of Societies eight names of its national leaders, that is, the President, Secretary-General and six others, often MCCs. These are persons that can sue or be sued in a representative capacity. The Court while on one hand holding that UNIP was a members' club, was at the same time clinging to the notion that the Party and the Government were unseparable, for instance, it was observed that

With greatest respect therefore, it would appear to me that the United National Independence Party cannot be strictly equated with the members' club; granted that it is not incorporated. Meaning no disrespect, I have not come across a members' club which forms a Government of a sovereign republic.¹

The question of who is cited in a representative capacity is very important and should not depend on the role the Party and its officials are willing or unwilling to play in that regard. The people cited should

1. Nkumbula and Kapwepwe v. UNIP (1978) ZR 388. Following this decision the case record was amended and the parties became Nkumbula and Kapwepwe v. Attorney-General. The quotation is per Sakala, J., at p. 391.

be in a position to enforce the Court's order, decision or directive, for instance, suppose the Court had nullified the proceedings of the General Conference and had ordered that the Party re-convened the 8th General Conference. The Attorney-General could not have carried out such an order because he has no legal power to call a Party Congress. The Party, on the other hand, might have felt not bound by an order directed at the Attorney-General. This shows that in certain circumstances representative proceedings are more than flexible tools of convenience in the administration of justice. These proceedings are intended to bind a body of persons that is otherwise beyond the reach of the law. The difficult, however, remains, namely that the common law principles of representative capacity or proceedings were not devised to regulate the role of political parties in a one-party regime. In fact as the Malaysian case of Mohd Noor bin Othman and Others v. Mohd Yusof Jaafar, Secretary of UMNO Tanjung Division, Penang and Others,¹ shows, the law on status of political parties as laid down under common law and statute, is in need of reform.

The circumstances of the main case arose out of the provisions of Art. 38(3) of the Constitution of Zambia which provides that members of the General Conference of the Party shall elect the President of the Party who become the Presidential Candidate.² Prior to the 1978 Party conference, the Constitution of the Party provided that any qualified member of the Party could stand as a Presidential Candidate.³ The Constitution adopted at the 1978 General Conference provided that a person was not qualified as a candidate for the office of President unless, in addition to other general qualifications, he had been a member of the Party for at least five years.⁴ This provision was not among the proposed amendments circulated prior to the meeting of the General Conference as required by the Constitution of the Party.

1. (1988) MLJ R8-22-29, infra pp. 162-163; infra, p. 162.

2. supra, p. 137, et seq.

3. UNIP: Constitution, 1973, Art. 8

4. Constitution, 1978, Art. 50(9)

The first applicant was qualified to contest the presidency having joined UNIP more than five years before 1978 but his attempts to lodge his nomination at the general conference which he attended, met with intimidation and obstruction. The second applicant, who had joined UNIP only the previous year, was disqualified from contesting the presidency and did not attend the general conference. The trial court refused to grant any of the declarations sought by the applicants. On appeal, it was contended that the method used by the Central Committee of the Party in amending the constitution at the general conference showed mala fides in that such amendments were intended to exclude the second applicant and were ultra vires the Constitution of Zambia. On whether the courts have jurisdiction to intervene in matters pertaining to internal organization of the Party, the Supreme Court's view could be gathered from its observation that the purpose of the Party promulgating a constitution to which it was expected that every member of the Party would adhere, ought to be taken by the law as meaning that if any member of the Party did not adhere to the constitution, or if rules as to notice or any other matter were not observed, any court was bound to acknowledge that such rules had not been observed. In the same way, if the Party failed to abide by its constitution, any court was bound to make an appropriate finding to that effect. The Court, thus, found that the general law relating to the necessity for associations of any kind to observe their own regulations applied to UNIP and that the failure to circulate the controversial amendment was a breach of the Party's own rules.¹

On the second ground of appeal, the Court noted that the Constitution of Zambia sets out in Art. 38(2) qualifications for the presidential candidate and Art. 38(3) requires that such candidate be elected by the General Conference of the Party under the provisions of

1. Nkumbula and Kapwepwe v. Attorney-General (1979) ZR 267, per Gardner, Ag. CJ., at p. 277.

the Constitution of the Party:-

It is clear therefore that the Republican Constitution itself insists that the Presidential Candidate must be elected by the Party and for the Party to impose additional restrictions on candidates is a matter entirely for the Party in its own jurisdiction to decide. The wording of the Republican Constitution clearly indicates that the Party is the sole arbiter as to who shall be Presidential candidate, and for the Party to impose its own restrictions can in no way be said to be usurping the functions of the Republican Constitution.¹

This observation did not mean that the courts cannot apply the ultra vires doctrine to rules of the Party that contravenes the provisions of the Republican Constitution. The opinion of the Court should therefore, be restricted to saying that the additional requirement that a Presidential Candidate should have been a member of the Party for a minimum of five years, did not introduce a new element to the already existing requirement that he should be a member of the Party. Suppose the amendment were to the effect that the Presidential Candidate should be elected by male members of the Party only. Chapter II of this study has shown that there was a time in the UK and NR when the vote for members of Parliament and the Advisory Council was restricted to male voters only. Probably the courts would hold that such a provision although primitive and undemocratic, was an internal matter for the Party to decide and adopt in accordance with its policy. If, however, the Party Constitution were to provide that the Presidential Candidate could be either a citizen or non-citizen of Zambia, the courts would hold such a provision ultra vires the Constitution which expressly provides that the Presidential Candidate should be a Zambian citizen.²

Of importance in this decision was the fact that the Courts reviewed Party rules vis-à-vis their application to members of the Party and their relationship with the Constitution of Zambia, which is the supreme law and instrument which sets down both the rules for the

1. Nkumbula and Kapwepwe v. Attorney-General (1979) ZR 267, per Gardner, Ag. CJ, at p. 277.

2. Zambia: Constitution of Zambia Act, 1973, Art. 32(2)(a).

exercise of political authority in Zambia and the limits of that authority. But concepts such as mala fides or ultra vires as they apply to Party rules or activities of Party organs, are hardly in the contemplation of or understood by the organizers of an African political party who regard their movement simply as a political mobilization of the people for political ends. Judicial intervention in such cases might not prove helpful in remedying injustice or irregularity in a particular case; it does, however alert the party to some serious consequences should it not follow its laid down rules. On the other hand, the attitude of the Supreme Court in this case seems to indicate some short-comings in invoking judicial intervention in party matters. The Court found that the Party was in breach of its rules, but because the delegates had adopted the new Party rules and there was no evidence showing that if a further conference were held there would be any change in the unanimous adoption of the rules and the elections held thereunder; "I would hold that this is not a proper case for this court to make the declarations asked for. I would dismiss this appeal".¹

The Court could not have nullified the proceedings of the Party Congress without plunging the country into a serious constitutional crisis. Such nullification would have resulted in the dissolution of Parliament and the Central Committee and rendered void numerous appointments made by the President. Between the two evils - of plunging the country into a constitutional crisis and not safeguarding the interests of the two applicants out-manoeuvred by their political opponents - the Court settled for the maintenance of the status quo. That was not a sign of want of judicial assertiveness, but judicial realism. Nullification probably would have resulted in the nullification of the appointment of some of the judges who were actually hearing and deciding the very case itself. In a recent Malaysian case the court did not only declare proceedings at a party conference as null and void, but that the party itself was 'null and void'.

1. Nkumbula and Kapwepwe v. Attorney-General , op. cit., per Gardner, Ag. CJ, at p. 278.

The law in Malaysia on the legal status of political parties is based on the Societies Ordinance, 1949, which was repealed and replaced by the Societies Act, 1966, which provides that a society of seven or more persons whatever its nature or object, should be registered under the Act with the Registrar of Societies.¹ By definition, a 'society' includes a political party. The Act requires that a local society, that is a branch of a society, and the national organization, that is the headquarters, should be registered before it can function² and any society which purported to function prior to such registration, was an unlawful society.³ It is an offence to organise an unlawful society⁴ or to attend a meeting of an unlawful society.⁵

The United Malays National Organization (UMNO) had dominated the political scene in Malaysia since 1955. It played a dominant role in the struggle for Merdeka (Independence); providing the Prime Minister and the Deputy Prime Minister after achieving Merdeka. These were often the President and Vice-President of UMNO, elected at the Party's General Assembly which met once in three years. The General Assembly - the equivalent of UNIP's Party Congress - forms the top of the pyramid structure of UMNO whose lowest organ were branches, over 8,000 of them and more than one million members.

The (June) 1987 election of the President and the Vice-President and twentyseven members of the Supreme Council of UMNO - the equivalent of UNIP's Committee of Chairmen - attracted more attention than usual because for the first time there was a serious challenge to the top leadership of the party. The President and Vice-President were in fact elected with narrow margins of 43 and 40 votes, respectively. It was then alleged that some of the voters (delegates) who participated in the proceedings of the General Assembly had come from societies not registered with the Registrar of Societies as required by the provisions of the Societies Act, aforementioned.

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| 1. Malaysia: | Societies Act, 1966, sec. 7(1). |
| 2. | <u>ibid.</u> sec. 6(2). |
| 3. | <u>ibid.</u> sec. 12. |
| 4. | <u>ibid.</u> secs. 41(c) to 47 prescribe offences. |
| 5. | <u>ibid.</u> sec. 43 |

In Mohd Noor bin Othman and Others v. Mohd Yusof Jaafar, Secretary of UMNO Tanjung Division, Penang and Others,¹ the twelve plaintiffs included officials and ordinary members of UMNO whose complaint was that the President, Vice-President and Council members were elected by delegates which included persons not entitled to vote at the conference having come from unregistered 'branches' or 'divisions' of the Party. The eight defendants included the Secretary-General of the MNO. The allegation having been proved beyond all reasonable doubt that persons from unlawful societies attended and voted at the General Assembly meeting, the Court decided that since up to the time of the trial the unregistered societies remained in existence as unapproved branches of UMNO, UMNO, its Divisions and Branches "are deemed by the Act to be unlawful societies."² The provisions of sec. 12 and 41 (i.e. a society which establishes a branch without the prior approval of the Registrar of Societies) were said to be clear and unambiguous and it would be doing violence to the language of the statute if only the unapproved Branches were declared unlawful societies but the parent body was not:-

In my judgment as UMNO was an unlawful society at the material time, persons who took part in the elections in 1987 at Branch, Division and the General Assembly levels committed an offence (section 43 of the Act) and therefore the elections were null and void and the office-bearers elected at all levels were not office-bearers at all. The entire series of elections were a nullity all the way.³

Accordingly, the plaintiffs as members of UMNO could not acquire any right founded upon that which was unlawful; the Court would therefore, not lend its aid to the reliefs sought. At the end of the judgement the judge made what he called obiter observation, that the Societies Act was originally intended to eradicate secret societies. It still does. But that legislation was, in his view, not suitable to regulate political

1. (1988) MLJ 22-28, Kuala Lumpur High Court Civil Suit.

2. ibid. per Harun, J., R8-22-88, at p. 14.

3. ibid. at p. 15.

parties. In Malaysia legislation was passed in 1981 which specifically dealt with political parties. That legislation was in the form of an amendment to the Societies Act (an insertion of a Part IA). In 1983 that provision was repealed and not replaced. The judge expressed the view that perhaps time had once again come for Parliament to pass a special law on the status and role of political parties as it had done with regard to trade unions and co-operative societies. The Court felt that mere amendments to the Societies Act would be nibbling at the problem; what was required was a fresh definition and role of political parties that were in line with a responsible party system.

The only point to be made between this case and the Zambian cases considered in this Chapter, is that the former arose within the context of a multi-party system and the Court had less serious inhibitions in declaring the UMNO as a whole, an unlawful society for want of registration. Such a finding would result in serious constitutional crisis under a one-party system. In as far as internal organization of the UMNO was concerned, there should be no difference between the internal administration of UNIP and UMNO: both ought to be democratically run in accordance with the law of the land and their own Constitutions. The evidence tendered in the UMNO Case, however, showed flagrant violation of both the law of the land, e.g. the failure to register branches, and its own constitution, e.g. by the presence and participation of delegates from unregistered branches in the proceedings of the General Assembly. The chief cause of UMNO's conflict with the law, was that local leaders formed branches of the Party on the eve of elections to use them as tools for their election to Parliament.

The case shows that judicial review of activities of political parties is essential lest some of these institutions, if left unchecked, might be turned into personal organizations or become secret and unlawful societies. Ideally, in a free and democratic society, political parties should go about their business free from judicial scrutiny.

Section 5. The Presidency and the Organs of the Party.

Although political parties do not feature in the traditional doctrine of the separation of powers, the development of parties has had effect on the old political categories inspired by Aristotle and Montesquieu. The degree of separation of powers is much more dependent on the party system than on the provisions of the Constitution.¹ Thus a single party system brings in a very close concentration of power particularly in the President. On the other hand, a two-party system also tends to concentrate power through its absolute majority in Parliament form of government: a majority governing party holds in its hands the essential prerogatives of the Legislature and the Executive. Parliament and Government are like machines driven by the same motor, the party. The regime is not so very different, in this respect, from the single-party system.² The concentration, however, is in the party and not in any one organ of the party. Of the single-party system, it has been said that the "one party government is intended in almost every case to produce one-man rule" and that a one-party government with its corollary of one-man rule not only negates freedom of the individual, but also erodes the supporting mechanism of constitutional government.³ On Malawi, it has been said that Dr Kamuzu Banda, the Life-President of both the MCP and the Republic of Malawi, referred to his Ministers as 'my boys', and that he occupied the position in which he was virtually the president of the party and the party itself.⁴

In Zambia the political party system introduced in 1973 the presidency is politically nearly omnipotent. The incumbent of the office of President derives his primary authority from the Party, by virtue of

1. Duverger, M., Political Parties, Their Organization and Activity in the Modern State; Methuen & Co. London, 3rd ed. 1978, p. 393.

2. ibid. p. 394.

3. Nwabueze, B.O., Constitutionalism in Emergent States; C. Hurst & Co., 1973, p. 159.

4. Williams, T.D., Malawi, the Politics of Despair; Cornell UP, 1978, pp. 196-198.

being the President of the Party. As President he is the head of the Party and its principal spokesman on Party, national and international affairs.¹ All Party organs and personnel are literally at his personal disposal. In the exercise of his power, he presides over all national Party organs and he uses his discretion in determining items to be included on agenda for discussion, and, he has power to delete any item from an agenda of the Central Committee and the National Council.²

Although the office of the President of the Party is part and parcel of 'the Party', for purposes of analysis, it could be isolated and considered either individually or in connection with other organs of the Party. The previous Sections have shown that UNIP is at law a society, a body of men and women combined together in pursuit of politics, devoid of legal entity or capacity. As such, its central role is performed by its leading officials, one of whom is its President. This Section looks at the dominant role of the President within the Party and the nation. The analysis, however, is confined to the relationship between the President and the Party Congress, the National Council and the Central Committee.

(i) The President and the Party Congress.

In the past, besides delivering his five-year speech and ensuring the election of the MCCs, the President did not make much use of the General Conference. Now that the President is the Chairman of the Party Congress³ he is likely to use this organ of the Party to his entrenchment and influence. Parliament is often dissolved at the Party Congress.⁴

(ii) The President and the National Council.

The National Council is the forum for Presidential announcements, directives and changes in Party and Government leadership. It meets once a

1. UNIP: Constitution, 1988, Art. 74.

2. ibid. Art. 74(d).

3. ibid. Art. 74(b).

4. Zambia: "Given under my hand and the Public Seal of the Republic of Zambia at Mulungushi this 22nd day of August, 1988", Proclamation No. 1, 1988, S.I. No. 112 of 1988.

year in an ordinary session.¹ Although MCCs are elected by the Party Congress, in the event of an MCC resigning (which has occurred three times between 1973 and 1989), or incapacitated (nil), dying (two during the stated period) or otherwise ceasing through removal by the President (several), the National Council fills the vacancy. The President is thereby in a position to change the composition of the Central Committee through replacements. That has been the source of discontent in UNIP circles particularly at the removal of an MCC 'elected' at the Party Congress. The holding of office in the Party is on the fundamental principle contained in the Constitution of the Party that "all organs of the Party shall ordinarily be elective".² There is, therefore, a presumption that once elected to an office, the officer would continue in office until the expiration of his term of office, or he dies or is otherwise removed on disciplinary grounds or he resigns.

Following the removal on 24th April, 1985, from the Central Committee as well as from the office of Secretary-General of UNIP and Prime Minister, of Humphrey Mulemba and Nalumino Mindia, respectively,³ the former having been elected MCC at the 1983 Party Congress while the latter was a nominee of the President, President Kaunda told a National Council meeting that such changes were routine reshuffles. Earlier in 1981 after removing Mainza Chona and Daniel Lisulo from the office of Secretary-General and Prime Minister, respectively (the former was removed from the Central Committee as well in which he was a nominee of the President and the latter remained in the Central Committee in which he was an elected member) the President had stated that "these positions are honourable only in the sense that one recognizes the trust bestowed on him by the nation."⁴

1. UNIP: Constitution, 1988, Art. 54(2).

2. ibid. Art. 24(1)(a).

3. Times of Zambia, 25th April, 1985: 'KK Bombshell', p. 1. (KK stands for Kenneth Kaunda)

4. UNIP: 1st Extraordinary National Council, 21st-29th April, 1981.

For the purposes of this study, the views of the Chairman of the NCEOPPDZ, Mr Chona, who was one of the victims of the changes referred to in this Section, were sought on the powers of the President. His view is that the powers of the President are extensive and that the changes in April, 1985, in which an elected MCC, who happened to be the Secretary-General of the Party, was removed from the Central Committee, among others, showed that the President could override the Constitution of the Party "unless he asked to relinquish his membership of the Central Committee, it means that our Constitution gives power to the President to remove elected members of the Central Committee. This widens the powers than was thought to be the case."¹

There is no evidence that the elected MCC removed from the Central Committee in 1985 had resigned from the Committee. Since there is no provision in the Constitution of the Party empowering the President to remove from the Central Committee a person elected to the Committee by the Party Congress, such a removal could be described as 'unconstitutional'. The Constitution empowers the President to take any disciplinary action against any member of the Party on the grounds of the member's misconduct and to report his action to the Committee of Chairmen.² In the public service, 'disciplinary action' means a process in which a public officer is formally charged and is given an opportunity to exculpate himself, often in writing.³ In politics no such procedures exist: 'disciplinary action' means the imposition of a sanction.

The mid-term removal and replacement of MCCs do not disturb the tribal balancing in the Central Committee because the removed MCC is replaced by someone from the same Province: the removal is a personal and not a provincial lose. However, once MCCs have been afforded the status of

1. Chona, M.M., Appendix 'A', infra, Answer to Question No. 8, p. 546.

2. UNIP: Constitution, 1988, Art. 74(h).

3. Zambia: Constitution of Zambia Act, 1973, Public Service Commission (Delegation) Directions, Cap. 1, Subsidiary, Part IV, Reg. 8.

'elected MCCs', their removal should be in accordance with the provisions of the Constitution of the Party in the context of the observation of the Supreme Court in Nkumbula and Kapwepwe v. Attorney-General,¹ namely that the purpose of the Party in promulgating a Constitution must be taken by law as meaning that the Party would observe its rules. The problem, however, is that in the absence of a formal charge followed by a disciplinary action, the maxim eodem modo quo oritur, eodem modo dissolvitur² cannot be invoked by a person removed from the Central Committee. The highest appellate organ in the Party, the National Council ad hoc Appeals Committee can consider appeals against expulsion from the membership of the Party or appeals from decisions of the Central Committee.³ There is no procedure through which a person removed from the Central Committee might challenge the decision of the President. So far there has been no case in which a person removed from the Central Committee has challenged his removal either before a Party organ or the Courts of law. As a matter of hypothesis, a court of law would probably hold that such a removal 'unconstitutional' and null and void, except where it was as a result of a 'disciplinary action'. Because the National Council meets only once a year,⁴ it hardly exercises its extensive powers and functions.

(iii) The President and the Central Committee.

Originally the General Secretary of UNIP was primus inter pares to his fellow MCCs in the Party. The Independence and One-Party Constitutions elevated the position of the President far above the other MCCs; in fact he is rarely referred to as an MCC, of which he is. Although the President selects the MCCs, once he and the other MCCs have been elected by the Party Congress, they are of equal status, hence, the provisions of the Constitutions

1. (1979) ZR 267, supra, pp. 154 - 160.

2. What has been created by a certain method may be extinguished by the same method.

3. UNIP: Constitution, 1988, Art. 56(i) and Reg. 18

4. ibid. Art. 54(2).

of the Party did not provide that one of the functions of the Central Committee was to advise the President.¹ The Central Committee is the primary elected national organ of the Party and MCCs are expected to deliberate in that organ on equal terms with the President. The provision that the Central Committee 'advises the President' was contained in the Constitution of Zambia.² The Party, however, operates under its own Constitution and the provisions of the Constitution of Zambia are irrelevant to the administration of UNIP.

The President has assumed a dominant role over the other MCCs, first, through the power he exercises of constituting the Central Committee, e.g. the enlargement of the Central Committee at the Tenth Party Congress in August, 1988, which brought into the Central Committee his own hand-picked men and women, including non-political public functionaries, devoid of political support or base in the country. The inclusion of Cabinet Ministers in the Central Committee was a reversion to earlier arrangements; the controversial Central Committee elected at the Mulungushi Conference in 1967 and dissolved by President Kaunda in 1969 on grounds of tribal conflicts and the 1970 'decentralized' Central Committee, included Cabinet Ministers. Secondly, his deployment of MCCs into provincial administration gives the President the control of the country as a whole. Thirdly, through the power of removal of any MCC from the Central Committee at any time.

The principle that the Central Committee and Cabinet should have separate membership was recommended by the NCEOPPDZ³ and was accepted by the Government⁴ which added its own dimension that the Central Committee should take precedence over Cabinet.⁵ Eventually that principle was enshrined in the provision that where a decision of the Central Committee was in conflict with a decision of Cabinet, the decision of the Central Committee shall prevail.⁵

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1. UNIP: Constitution, 1973, Art. 12; 1978, Art. 54 and 1988, Art. 59
 2. Zambia: Constitution of Zambia (Amendment) Act, 1975, No. 22, Art. 47C(1).
 3. NCEOPPDZ, Report, 1972; paras. 148 and 149, p. 45.
 4. NCEOPPDZ-SRAG, 1972, pp. 24 and 25.
 5. Constitution of Zambia (Amendment) Act, 1975, loc. cit., Art. 47C(2).

The inclusion of Cabinet Ministers in the Central Committee of the party is also adopted by CCM, for instance, the President, the First Vice-President (the Prime Minister), the Second Vice-President (the President of Zanzibar), the Ministers of Natural Resources and Tourism, of Local Government and Co-operatives, and of Trade and Industries, are members of the Central Committee.¹ The ministers are appointed by the Chairman of CCM as members of the Central Committee.

In Zambia the Tenth Party Congress elected 40 of the 68 MCCs.² The President appointed seven other MCCs,³ and he is empowered to appoint not more than 20 Cabinet Ministers as MCCs.⁴ All 16 Cabinet Ministers were appointed to the Central Committee.⁵ The four MCCs who were left out of the Central Committee, three reportedly on grounds of ill-health and the fourth for re-deployment into foreign service, were known to be outspoken critics of the Party and its leadership. The fact that 21 out of 25 MCCs who served in the 1983-1988 Central Committee are continuing in the 1988-1993 Central Committee, shows that there is little turn-over in the leadership of the Party and that the leadership is entrenched. Such an entrenched leadership brings, prima facie, stability in the leadership but it also results in stagnation in the Party in particular and the country in general.

Although there is provision on how to solve a conflict in decisions of the Central Committee and Cabinet, there is no provision on how to solve a conflict between a decision of the President and a decision of the Central Committee. For example, a conflict could occur between a decision of the President disciplining a member of the Party

1. Esterhuysen, P., and Rudolph, H., "Tanzania: The Teacher's strategy", Bulletin, Vol. 27, No. 12, 1987, 221-223 at p. 222.

2. UNIP: Constitution, 1988, Art. 57(1)(b).

3. ibid. Art. 57(1)(c).

4. ibid. Art. 57(1)(d).

5. Times of Zambia, 3rd November, 1988; 'Cabinet Reduced', p. 1.

on the grounds of the member's alleged misbehaviour and of the Central Committee that the President's action was unwarranted. Such a situation could occur because the President is required to report any disciplinary action to the Central Committee for ratification.¹ The Central Committee can refuse to ratify a President's disciplinary action and instead make its own decision on the matter. Democratically, the majority's (that is the Central Committee's) decision should prevail over that of the President. In practice, however, because of his dominant position, individual members of the Central Committee might express reservations on the Presidential action, but the Central Committee as a whole, would hardly over-rule the decision of the President as that would be tantamount to a vote of no confidence in the President.

The enlargement of the Central Committee from 25 to 68 MCCs and the reduction of Central Committee meetings from twelve to two in a year,² will create a new form of relationship between the President and the MCCs: there will be less close comradeship between the President and the MCCs compared to that which existed when the Central Committee was small and composed of seasoned politicians. The inclusion of the armed forces and parastatal chiefs and trade union leaders in the Central Committee must be seen as an attempt not to facilitate participatory democracy, but to spread the responsibility for the administration of the State to all those in the leadership of leading institutions. Previously, the poor performance of the economy and soaring crime rate, were blamed on the policies and performance of the Party in general and the Central Committee in particular. The enlargement of the Central Committee spread collective responsibility to all those concerned with national leadership - in the Party, the Government, parastatals, trade unions etc. The enlargement will not

1. UNIP: Constitution, 1988, Art. 74(h).

2. ibid. Art. 58(2).

end the chronic shortages of essential commodities such as cooking oil, sugar, bread, soap, salt or mealie-meal, or, eliminate crime. On the contrary, the inclusion of parastatal chiefs in the Central Committee might in fact result in weakening Central Committee's criticism of the performance of the public sector.

One of the immediate consequences of the inclusion of Cabinet Ministers in the Central Committee, was the blurring of the separation of the Central Committee and Cabinet; a separation the NCEOPPDZ considered essential under a One-Party system.¹ The inclusion of the Cabinet Ministers in the Central Committee means that the dichotomy between the Central Committee as the policy-formulating body and the Cabinet as the policy-implementing body, has been, to some extent, modified. The fact that the old Central Committee has been converted into the Committee of Chairmen and is also empowered to initiate policies for consideration by the Central Committee, the National Council and the Party Congress,² has not changed the status and role of the Central Committee as the Party's policy-formulating body. The Cabinet has, consequently become part and parcel of the Party's policy-formulating machinery. Under the present arrangement, power is retained by the President. The Central Committee has become a deliberative body, there merely to endorse decisions of the President and the Committee of Chairmen. The role of the Secretary-General, the Prime Minister, Provincial MCCs and armed forces and parastatals chiefs as well as Cabinet Ministers is to inform the Central Committee of what is happening in their field of activity and carry out decisions of the Central Committee. Cabinet has become superfluous or redundant: Ministers will be told what to do in the Central Committee.

1. Zambia: NCEOPPDZ, Report, 1972, p. 47, par. 148.

2. UNIP: Constitution, 1988, Art. 63(1)(g).

What was said when the One-Party system was introduced in Zambia in 1972, could still be said to-day, that the introduction of the One-Party system by itself resolved nothing, and that the Government of Zambia had to demonstrate that the new structure was any more effective than the old, either in providing a stable base for a UNIP Government, or for mobilizing people and resources for development.¹ The present Central Committee is a national body constituted by the President to assist him running not the Party but the country. The original concept of the Central Committee of UNIP, composed of political leaders, has been destroyed. The election of the MCCs at the Party Congress, merely legitimizes the Presidential invention, hence, MCCs are now required to subscribe an oath before the President, pledging obedience to the Party,² in reality to the President. One of the adverse effects of such devices is that it lowers the importance of the role and decisions of a national organization in the estimation of the members of the public who make up the majority of the population.

The Central Committee is dominated by the President and the Constitution of UNIP clearly states that the Secretary-General of the Party (the 'No. 2'), carries out all Party functions as directed by the President.³ Although the Party Congress and the National Council are the supreme and the highest policy-making bodies, respectively, it is the Central Committee's composition, mode of election, role and prominence that are often in the public's perception of the central role of UNIP in Zambia. The Central Committee is the visible Party in action. In the final analysis, the central role of the Party's Central committee, is played by the President who pulls the lever in practically all important decisions and actions of the Party.

1. Pettman, J., Zambia, Security and Conflict; Friedmann, 1974, p. 241.

2. UNIP: Constitution, 1988, Art. 18(2)(d), Schedule.

3. ibid. Art. 78(g).

Section 6. Participatory Democracy and the Judiciary.

Under a multi-party system it could be said that government consists of two elements: the political and the non-political. The first is temporary and elected; the second is permanent and appointed. Under a One-Party system, the first is also elected but is also permanently in office. In both cases, however, one could not exist without the other: theirs is essentially a partnership of mutual dependence. Without civil servants to implement Party policies, UNIP would be impotent. If the Party were not to rely on the integrity of the people operating the civil service, the administration of Zambia would be threatened. The civil service has the task of translating political objectives of the Party into practical realities.

In Chicewa, one of the Zambian languages used at UNIP public meetings in interpreting speeches made in the official language, 'politics' is translated as ndale za dziko: ndale (tricks) za (of) dziko (country). This translation of 'politics', notwithstanding the trickery aspect, perceives politics as something which politicians do using the power of the state something which private individuals cannot do. 'Tricks of the country' have no definite rules: politics seek to deal with controversial issues by looking at the arguments for and against, seeking alternative solutions, and then, once a decision to act has been taken, those in authority have to use authority and the administration - power of government - in enforcing the political will of the rulers. Civil servants who form part of the executive machine are expected to be politically neutral as far as their work - implementing political decisions - is concerned.¹ They will obviously have their own political views, which may or may not coincide with those of the politicians they are employed to serve, but these should not affect their neutrality or ability to

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Infra, p. 214.

do their jobs efficiently. If a civil servant had such strong political convictions that he found it impossible to suppress them when he were performing his official duties, it would be advisable to resign from the public service and enter politics. That forms the background to our consideration of participatory democracy in Zambia and the judiciary.

(a) Party Control of the Judicial Service Commission.

In principle, the policy that senior members of the judiciary should not participate in politics, is advocated in UNIP. Consequently, the appointment and removal of judges are matters regulated by the Constitution of Zambia. The Party does not show a keen interest in the manner the judiciary carries out its functions unless there is a case before the courts in which political leaders are implicated. The Party, through its President, has had some influence on the Judicial Service Commission which is responsible for the appointment and deployment of some of the judicial officers. Under the Independence Constitution, the Judicial Service Commission consisted of the Chief Justice, appointed by the President, as the Chairman, the Chairman of the Public Service Commission, a judge of the Court of Appeal or the High Court selected by the Chief Justice and one person appointed by the President, as the members of the Commission.¹ The person appointed by the President was required to be a person qualified to hold or had held, a high judicial office.² With the exception of the Chairman of the Public Service Commission, the Commission was, therefore, composed mostly of lawyers.

Under the One-Party Constitution, the composition of the Judicial Service Commission was slightly expanded by the appointment of the Attorney-General as a member of the Commission.³ A year later,

1. UK: Zambia Independence Order, 1964, S.I. 1964/1652, sec. 104, (1) (a) to (d).
 2. ibid. sec. 104(2) (a).
 3. Zambia: Constitution of Zambia Act, 1973, Art. 115(1) (a) to (e).

the Secretary to the Cabinet, was included in the membership of the Judicial Service Commission.¹ The Commission of composed of persons appointed by the President, who is empowered to give the Commission such general directions with respect to the exercise of its functions and the Commission is required to comply with such directions.² The Commission, however is not subject to the direction or control of any other person or authority in the exercise of its functions. The Party is not represented on the Judicial Service Commission; the one person required to be appointed by the President, has often been the Chairman of the Law Association of Zambia, the body which represents the legal practitioners of Zambia's fused legal profession: barristers and solicitors are called to the Zambian bar as Advocates. Except for the influence of the President of the Party, UNIP as a political organization, has no direct control of the Judicial Service Commission.

(b) Appointment of Judges.

The Judicial Service Commission is vulnerable to political influence by the President through his power of appointment of its members, the appointment of Supreme Court judges, and, the deployment of judges in other government services, for e.g. chairmanship of State Commissions. Even in the USA where in some States judges are directly elected by the people, the President nominates the Chief Justice and appoints judges of the Supreme Court.³ In the UK, judges are appointed by the Lord Chancellor, a politician and a member of the Cabinet. It cannot be argued that in these countries political considerations do not enter into the

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1. Zambia: Constitution of Zambia (Amendment) Act, 1974, No. 18, Art. 9 amending Art. 115(1) of the Constitution of Zambia Act, 1973.
 2. ibid. Art. 115(3).
 3. Williams, P.M., "The Supreme Court and Politics", Oxford Journal of Legal Studies, Vol. 5, No. 1, 1985, p. 92.

appointment of judges under the two-party system of these two developed countries: politicians are bound to give preference to the appointment of persons as judges who were known to be politically sympathetic with the policies of their political party.

Under Zambia's One-Party system, unlike under the multi-party system under which the President appointed judges of Court of Appeal in accordance with the advice of the Judicial Service Commission, the President appoints these judges without the advice of the Commission.¹ The President cannot, however, remove a judge of the Supreme Court except with the advice of a tribunal consisting of a Chairman and not less than two other members who should be persons holding or had held a high judicial office.²

UNIP does not afford the judiciary any representation in any of its organs such as the Party Congress, the National Council, the Central Committee or lower bodies. Although the Chief Justice is often invited to attend the official opening of the Party Congress and the National Council, there is no way in which the Party can become familiar with the political views of judges. Members of the armed forces (the police, the army, prison services and intelligence) are represented in most Party organs and the Party's National Council, has had the opportunity to hear political views of representatives of these state institutions. There is no stated policy on the differentiation in the treatment of the judiciary and the armed forces. It is certainly not the Party's opposition to a politicization of the judiciary since both the armed forces and the judiciary are encouraged to form the Party Committee at the Place of Work.³ The fact that the President can appoint Supreme Court judges alone, introduces political considerations.

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1. Zambia: Constitution of Zambia Act, 1973, Art. 108(1).
 2. ibid. Art. 113(3) to (5).
 3. On Party Committee at the Place of Work, see infra. pp. 432-442.

(c) Judicial Officers' Membership of the Party.

At independence the colonial civil service structure was carried over into the civil service of independent Zambia to the extent that it was possible, the bureaucracy was insulated from the political interference of UNIP. The Independence Constitution contained a variety of provisions to make a demarcation between 'political' and 'non-political' decision-making structures. The judiciary was accordingly isolated from the political decision-making structure, e.g. the cabinet. The Present Constitution of Zambia prescribes for a number of very specific roles for the Attorney-General (Art. 57), the DPP (Art. 58), the Auditor-General (Art. 128), Parliament (Art. 79), the Central Committee (Art. 47C) and the Judicature, (Art. 107). These provisions provide the so-called checks and balances and they are based on the pervasive suspicion that politicians are evil and tricky men concerned with representing not their constituencies, but themselves. Consequently, it is contended that there was a need for the independence of the judiciary and that judicial officers should refrain from politics or establishing political links:

We tend to think that independence of the judiciary means just independence from the legislature and the executive. But it means much more than that. It means independence from political influence, whether exerted by the political organs of government or by the public or brought in by the judges themselves through their involvement in politics. Judicial involvement in politics (i.e. organised politics) has taken two main forms:

- (a) Decision Biased in Favour of a Ruling Party...
- (b) Judicial Membership of Political Parties.¹

There is no doubt that the presence of either or both of these 'evils' would adversely affect the role of the judiciary. The absence of any of these 'evils', however, does not per se, guarantee

1. Nwabueze, B.O., Judicialism in Commonwealth Africa; C. Hurst & Co. 1977, pp. 266-267. Brackets supplied.

the independence of the judiciary, for instance, under a military non-political party regime. One of the reasons advanced against the annexation to the Constitution of the State of the Constitution of the Party (in a One-Party State), is said to be that such an annexation would give the Constitution of the Party the force of law and become binding on all persons, members as well as non-members of the party: "This may be undesirable in view of the fact that there are persons who cannot be members of the party either because they are not citizens or because they hold office (e.g. judges) which enjoin on them non-involvement in politics".¹ This is not a valid reason against the annexation of the Party Constitution to the State Constitution since such annexation would not mean compulsory membership of the Party; membership would still remain voluntary. Annexation is objected to by the Party because it would be contrary to the concept of the 'supremacy of the Party' and might also enable Parliament to amend the Constitution of the Party; that is a prerogative of the Party.

In Zambia UNIP is a formal organization. Its distinctive feature is that it was deliberately established for the explicit purpose of achieving, inter alia, national unity and independence. UNIP is in a general sense, a 'social organization' because political activity is a social human activity. But, strictly speaking, UNIP is not a 'social organization' in the sense that it arose as a consequence of the people of Zambia living together. It is a formal organization with a set of goals to be achieved and rules that its members are required to follow. These have not emerged spontaneously in the course of social interaction but were consciously designed to guide the role of the Party in carrying out its aims and objects. It is a political institution. The question

1. Nwabueze, B.O., Presidentialism in Commonwealth Africa; C. Hurst & Co., 1974, p. 239. Brackets supplied.

whether judicial officers should or should not join the Party, can be decided by the Party which can assess whether such membership or prohibition from membership would be in accord with or contrary to, its objects. Membership of political party or parties by judicial officers does not per se adversely affect the independence of the judiciary. The fact that a judge was a member of the ruling political party does not necessarily guarantee decisions in favour of the party or its Government. UNIP learnt that lesson quite early in its life as a governing Party. The former Chief Justice James Skinner was a staunch member of UNIP and Zambia's first post-independence Attorney-General. When he became Chief Justice, he reviewed a case involving two Portuguese soldiers convicted of unlawfully entering Zambia. The convictions were quashed.¹ UNIP militants demonstrated at the High Court in Lusaka against the release of the two convicts and that forced Skinner to quit his post of Chief Justice and Zambia. The fact that Skinner was a staunch member of UNIP did not inhibit his ruling that two Portuguese should be set free. That was a political case in that the Portuguese soldiers entered Zambia in pursuit of FRELIMO fighters given shelter in Zambia by UNIP; the latter a party to which Skinner belonged. Even in countries where judicial officers are barred from joining political parties, they encounter difficulties in handling cases in which political parties are involved:

The experience of the judiciary in Nigeria shows that it finds itself in a more difficult situation if the parties in the case before it are political parties. To them, the correct, honest and unbiased decision is that which makes every party to the case get what it pleaded for. That is a situation which is incredibly difficult.²

1. The People v. Silva and Freitas (1969) ZR (unreported).

2. Yakubu, M., "The Judiciary Under a Presidential System of Government", ABULJ, Vol. 1, 1983, p. 28.

The fact of litigants being at variance is indeed the essence of every litigation otherwise there would be no dispute for the court to resolve one way or the other. The principle that judicial officers should not belong to political parties is based on the assumption that if judges joined political parties or the political party under a one-party system, in handling political disputes set in a legal context, or involving political parties or the Government, some might be tempted to lean on the side of the politician or the political party or the government of their favour. In the UK, for instance, judges are seen as neutral arbiters, as having no position or interest in any matter in dispute, between individuals or between individuals and the State. The law they are expected to enforce is thought of as established body of rules and principles which prescribe the rights, duties and obligations of the individual as well as the State.¹ The judge's first essential quality is impartiality. He is expected to take no side on a political issue: "When public opinion is sharply divided on any political issue, no judge ought to lean on one side or the other if that can possibly be avoided. Where it is, however, difficult to do so, then I think we must play safe".²

Membership of political party or parties by judicial officers does not per se result either in the politicization of the judiciary or biased court decisions in favour of a political party or leader or the government of the day. The impartiality of the judiciary depends, among other things, on the sociology of the body-politic of the community concerned. The James Skinner incident referred to earlier, confirms that fact. That incident, however, also confirms one other thing, namely

1. Palley, C., "Rethinking the Judicial Role - The Judiciary and Good Government", ZLJ, Vol. 1, 1969, No. 1, cites a protest in Scotland against Lord Clyde, President of the Court of Sessions' nomination of Lord Avonside, a judge of the Court, to the Commission established by the Conservative Party to investigate self-government for Scotland (quoting The Times, 27th July, 1968), p. 7.

2. Lord Reid, "The Judge as a Law Maker", JSPTL (1972) 12, 22, p. 23.

that the established body of rules of procedure and substantive law which judicial officers follow and/or apply, make it difficult for the judges to easily lean on the side of a political leader, or a political party or a government of their favour. Conversely, the established rules also make it equally difficult for judicial officers to unjustly treat political leaders, political parties, or government of their disfavour.

The former Chief Justice of Tanzania, Telford Georges' view on membership of TANU by judicial officers was that

in Tanzania there is no reason why a judicial officer should not be a member of TANU. In a sense every judge everywhere is a member of the government in the broad sense in that he plays an active part in some organised system by which order is regulated in the society.¹

UNIP has adopted this policy of not prohibiting judicial officers from having close links with the Party. The NCEOPPDZ did not make a direct recommendation on the membership of the Party by judicial officers but it recommended that membership of UNIP should be voluntary and open to all Zambian nationals.² Accordingly, a judge of the Supreme Court was in 1976 nominated by the President,³ as a member of Parliament and appointed the Minister of Legal Affairs and Attorney-General. During the 1978 General Election instead of waiting for a further nomination, the former judge contested and won a Parliamentary seat. He was appointed a minister to another ministry. In 1983 Parliamentary election, he retained his seat and he was re-appointed Minister of Legal Affairs and Attorney-General. In April, 1986, he was re-commissioned a judge of the Supreme Court and ceased being an MP and minister. In May, 1987, he was once again nominated an MP and appointed Minister of Legal Affairs and Attorney-General.⁴ This

1. James, R.W. and Kassam, F.M., Law and its Administration in a One Party State, Selected Speeches of Telford Georges; East African Literature Bureau, Nairobi, 1973, p. 55.

2. Zambia: NCEOPPDZ, Report, 1972; p. 49.

3. Nominated under Art. 66, Constitution of Zambia Act, 1973.

4. After the 1988 Parliamentary General Election, he was once again re-nominated MP and appointed Minister of Legal Affairs and Attorney-General.

case reveals at least two things, first, the danger that a judicial officer once exposed to political power or office, is inclined to develop a taste for politics, and, secondly, how the President can easily circumvent the rigorous procedures required to be followed on the removal of a judge from the Bench through nomination to Parliament without a guarantee of the officer of being re-commissioned to the Bench on dissolution of a Parliament.

The current fundamental principle is that except with his own consent, no person in Zambia should be hindered in the enjoyment of his freedom of assembly and association and in particular to form or belong to trade unions and other associations for the protection of his interests.¹ Notwithstanding the fact that under a One-Party system the freedom of association is curtailed, a judicial officer, like any other citizen, is entitled to enjoy that little freedom of association granted by the Constitution. A political party is a socialising institution and judicial officers live in the same political ethos as the rest of the members of the society and feel the same impact of popular opinion. They are not too far removed from the influence of the Party owing to the power politicians have in their appointment, promotion and deployment. A ruling political party would not favourably consider appointing to a high judicial office a judicial officer who appeared aloof and out of touch with development and sentiments in society. There should somehow be a link between a political party and the judiciary. Judicial officers should be allowed to membership of the Party but barred from active involvement in the tricks of the Party, e.g. holding of a Party office.

Recent changes in the law seem to suggest that UNIP might be moving towards a restriction on the 'politicization' of the public service. It is now provided that public officers, that is officers

1. Zambia:

Constitution of Zambia Act, 1973, Art. 23(1).

in the civil service, parastatal organizations and non-political staff in the service of the Party, should first resign their posts before they can stand for election to the National Assembly.¹ Previously a public officer could stand for election and he was required to resign upon being elected to the Assembly. The amendment is silent on whether a nominated public officer, e.g. the judge referred to earlier in this Section, would be required to resign before taking his seat in the National Assembly. That would be unfair and such a requirement would most likely be abused, e.g. as a mode of removing from the Bench judges whose security of tenure is protected by the Constitution.

CONCLUSION.

This Chapter has considered the manner some States in West, East and Central Africa amended or in some cases, discarded their Independence Constitutions in order to adopt a republican form of government or establish a de jure One-Party system. The Chapter has also considered the manner UNIP's national leadership is selected, the relationship between the organs of the Party and the President and the place of the judiciary in the political party system in Zambia.

The liberal democracy based on a multi-party system inherited at independence was tried for eight years but failed mainly because of inter-party violence² and UNIP's policy to eliminate opposition. Although the One-Party system has arrested violent political clashes, it has not eliminated opposition to UNIP or 'provincialism'. While the Party has encouraged 'tribal balancing' as a panacea against tribal pacts and conflict, it has also encouraged 'provincialism' through the inclusion of the Paramount Chiefs of Barotseland (Litunga Iluta Yeta) and of the Northern Province (Chitimukulu Ng'andu) and their deployment as the

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1. Zambia: Constitution of Zambia Act, 1973, Art. 68 as amended by the Constitution of Zambia (Amendment) Act, 1986, No. 3, Art. 7; infra, p. 287.
 2. See M.M. Chona, Appendix 'A', Answer to Question No. 1, p. 538.

provincial MCCs in their traditional Provinces. Such deployment confirms and encourages provincialism and weakens national feelings among the people in that as Paramount Chiefs, these MCCs can serve only in their areas. That weakens the Party: no other MCC can serve in these Provinces.

Although UNIP remains a 'mass organization', the general members of the Party are often not granted the opportunity to effectively participate in decision-making or election of the President or MCCs. Their assigned role is not to determine who should be their leaders, but affirming the selection of the leaders chosen for them by the President. The system of selection of leaders shows that the often canvassed view that anybody can run for office and that the arena of political combat under a One-Party system is open to any would-be political gladiator, is but a myth. In the real practical politics of the Party, every set of selection arrangements necessarily contain some sort of limits on the aspiration to power. That has resulted in some leaders remaining in office in perpetuity, and, less democracy in the internal organization of the Party. Unless a ruling party is democratically organized and run, it cannot democratically organize and run the State; as it is said, 'charity begins at home'.

In the transitional period the cross-deployment of judicial officers with other public officers or political leaders enables these men and women to operate on the same wave-length. The practice does not in itself affect the independence of the public service, e.g., the judiciary. On the contrary, it enhances the role of the judiciary in that through such links the judiciary with its wigs, gowns and English law, ceases to be viewed as a distant and isolated exotic odd institution purveying foreign values, but as one of the ordinary local institutions of the Party and its Government. A certain measure of tension, however, should be allowed to exist between institutions, but that should arise from the institutions' effective performance of their allotted functions.

CHAPTER V.

THE PARTY, GOVERNMENT AND THE PUBLIC SECTOR IN ZAMBIA.

The Role of the Party and Party Functionaries in
Public Administration.

Introduction.

The role of UNIP in Zambia's public administration is conducted under the provisions of the Constitutions of the Party and of the Republic. According to Hans Kelsen a legal system consists of hierarchically arranged norms; all the norms traceable from the grundnorm at the top form a system of norms.¹ The grundnorm is not created in a legal procedure by a law creating organ. It is not a norm of positive law. Whereas norms of the legal system are created by the real acts of will, of a legal organ, according to the procedural requirements of norm creation, the grundnorm is not. He described the 'basic norm' as an 'initial hypothesis, presupposed' in juristic thinking. In constitutional terms, Kelsen's theory proffers a constitution in a positive-legal sense and a constitution in a legal-logical sense.² The term 'basic norm' was used in two distinct senses:-

- (a) as a presupposition, i.e. as a norm presupposed in juristic thinking, and
- (b) to refer to an existing concrete, historically first Constitution.

This Introduction is restricted to the second aspect. In Ghana where the Independence Constitution³ was repealed⁴ and the repealing Constitution was overthrown in a 'revolution', the Armed Forces Revolutionary Council (Establishment) Proclamation, provided, inter alia, that

Until such time as a new Constitution is promulgated and comes into force, the Revolutionary Council shall have power for such purposes as it may think fit to make and issue decrees which shall have the force of law in Ghana.⁵

1. Kelsen, H., The General Theory of Law and State; Harvard UP, 1949, p. 117.

2. Kelsen, H., "Professor Stone and the Pure Theory of Law", 17 Stanford Law Review; 1965, 1128 at 1141.

3. UK: Ghana (Constitution) Order in Council, 1957, S.I. 277

4. Ghana: Constitution of Ghana Act, 1964, CA No. 1

5. 1979, No. 1, sec. 3(1); 4th June, 1979.

The Constitution of Ghana promulgated by the Armed Forces

Revolutionary Council provided as follows:

This constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this constitution shall, to the extent of the inconsistency be void and of no effect.¹

The view in Ghana is that the 'basic norm' is not the Constitution but the Armed Forces Revolutionary Council's Proclamation because the validity of the 1979 Constitution can be challenged by reference to the Armed Forces' Proclamation and Decree which effected a 'lawful devolution'. There are, according to this view, not really two competing 'basic norms' in Ghana, neither are there two competing constitutions. There is one Constitution, that of 1979, but whose validity cannot be presupposed, because it owes its validity to another positive norm of the system, the Proclamation, via the Armed Forces Decree.²

In Kenya where the Independence Constitution³ was not overthrown in a violent revolution but amended to provide for a republican system of government,⁴ the view is that the amended Constitution is the grundnorm⁵; it is presupposed at the apex of the legal system. The Constitution provides:

This constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall to the extent of the inconsistency be void.⁶

In Zambia there was no revolution; the phenomenon that occurred on the mid-night of 24th October, 1964 was one of 'lawful devolution' when the Imperial Power, Britain, granted independence and republican status to

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1. Ghana: Constitution of the Third Republic of Ghana (Promulgation) Decree, 1979, No. 24, sec. 1(2).
 2. Ahwoui, K., "Kelsen, The Grundnorm and the 1979 Constitution", UGLJ, Vol. XV, 1978-81, 139 at p. 160
 3. UK: Kenya (Constitution) Order in Council, 1963, S.I. 1968
 4. Kenya: Constitution of Kenya (Amendment) Act, 1964, No. 28, sec. 4.
 5. Rachuonyo, J.O., "Kelsen's Grundnorm in modern Constitution-Making: The Kenyan Case", Verfassung und recht in Uebersee, 20 Jahrgang 4, 1987, p. 430
 6. Kenya: Constitution of Kenya Act, 1969, No. 5, sec. 3. Section 47 provides for amendment of the Constitution.

its former Protectorate of NR. It could be argued that in such a situation the umbilical cord between the Imperial Parliament and Zambia was not cut since Zambia would have to trace the validity of its independence Constitution to the validity of the Zambia Independence Order, 1964.¹ The One-Party Constitution which repealed the Independence Constitution, however, was intended to sever that Constitution from any links with the UK Parliament, hence it stated, albeit in the Preamble, that

We, the people of Zambia, by our representatives assembled in our Parliament, having established a One-Party Participatory Democracy under the Philosophy of Humanism Do hereby enact and give to ourselves this Constitution.²

Although the Constitution of Zambia, 1973, unlike that of Ghana (1979) and of Kenya (1964) does not state that the Constitution is the supreme law of Zambia and that any other law found to be inconsistent with any provision of the Constitution shall be void and of no effect, it is nevertheless regarded as the supreme law of Zambia.³

UNIP has its own Constitution which provides that no Act of Parliament, regulation, rule or by-law shall be in conflict or inconsistent with the Constitution of the Party, or its national policies.⁴ Prima facie, that provision purports to spell out where the 'Zambian grundnorm' resides, namely in the Party. The Constitution of the Party is not created in a legal procedure by a law creating organ. It is not a norm of positive law. Prima facie, that would make it 'the basic norm', the grundnorm; that is, in as far as the Party Constitution's provision quoted above purports to portray. In fact the Party's Constitution is a political document which cannot be equated to a proclamation or decree of a military junta which is legislative, e.g. those of the Armed Forces Revolutionary Council in Ghana which can be presupposed to be the grundnorm. The UNIP leadership,

1. UK: Zambia Independence Order, 1964, S.I. 1652.

2. Zambia: Constitution of Zambia Act, 1973, No. 27, Preamble

3. Infra, p. 246, et seq.

4. UNIP: Constitution, 1988, Art. 8; infra, p. 322

however, utilized the Republican Constitution and Government departments in asserting its central role, e.g. in the deployment of its functionaries in public administration. After independence UNIP deployed Provincial Ministers (to assist UNIP's regional officials in membership drives and carry out Government functions, e.g. implementation of Development Plans) and Special Presidential Public Relations Assistants (SPPRA) (to improve race relations and work-discipline among public servants and those engaged in the copper-mining industries). Political Assistants were also appointed to provide a link between public administration (the Provincial Minister, civil servants and local government officers) and the Party. Their role was mainly political and operated under the Constitution of the Party, while the Provincial Ministers and the SPPRA operated under the Party and the Republican Constitution having been deployed by the President.¹

During the struggle for independence most of the African party leaders were involved with some aspects of colonial authority, e.g. in their application for registration of party branches, or application for a permit to hold a public meeting² or when arrested and prosecuted for holding an unauthorized rally.³ These encounters gave the African leaders the impression that real power resided not necessarily in the Legco or the Legislative Assembly, but at the Secretariat (the office of the Chief Secretary) and at the Boma (the office of the Provincial or District Commissioner). Hence, the deployment of Party functionaries in public offices which were perceived as the seat of real power. That perception lingers on to-day and forms the background to the role of UNIP in public administration. UNIP, as a party and not as the Government, was able to spot-check the internal operations

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| 1. Zambia: | See, e.g. Circular OP/4/108/66 of June, 1966 (on functions of District Secretaries), OP/4/13/69 of July, 1969 (on the functions of Provincial Ministers). |
| 2. NR; | under sec. 22(2), Societies Ordinance, 1957, No. 65, and sec. 28, Northern Rhodesia Police Ordinance, 1926, as amended by the Northern Rhodesia Police (Amendment) Ordinance, 1955, No. 10, sec. 30A. |
| 3. | e.g. <u>R. v. Mulumba</u> (1959) R & N LR 184 and <u>Attorney-General v. Hagamata</u> (1959) R & N LR 226. |

of public offices in the country. The presence of Party functionaries in public offices did not result in the introduction of some political directives in the internal organization of the public service; public officers continued to work in accordance with the Constitution of the Republic and their Civil Service Standing Orders. Party functionaries provided only the political 'push' which made public officers come up with speedy decisions, probably at the expense of the quality of those decisions.

Section 1. The Supremacy of the Party Decisions.

One of the aims of the establishment of a One-Party system in Zambia was to achieve the 'supremacy of the Party' vis-à-vis the Government administration.¹ The concept of the 'supremacy of the Party' although it does not contain a precise legal meaning, is central in the role of UNIP in Zambia to-day. The NCEOPPDZ's recommendation was that it was desirable that there should be a separation between UNIP and the Government and in the membership of the Central Committee and Cabinet, with the exception of the Secretary-General of the Party and the Prime Minister who were to be members of both the Central Committee and Cabinet.² That recommendation meant that distinction between the Party and the Government was to be maintained. The decision that the Party should be supreme (over the Government) came from the Government.³ The decision of the Government that under a One-Party system UNIP should be supreme convert the Party into a supreme organization over the Government as established under the Republican Constitution. The Party's supremacy had to be achieved through the Constitution of Zambia.⁴

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| 1. Zambia: | <u>NCEOPPDZ, Report, 1972, Terms of Reference 9(f), p. 69.</u> |
| 2. | <u>ibid.</u> p. 47, par. 148. |
| 3. | <u>NCEOPPDZ-SRAG, 1972, p. 24.</u> |
| 4. | <u>Infra, p. 195.</u> |

The NCEOPPDZ refrained from making an express recommendation on the 'supremacy' of the Party. It instead opted for a 'weak' President and a 'strong' Prime Minister by proposing that the Prime Minister appointed Ministers, Deputy Ministers and the Attorney-General in consultation with the President. The Prime Minister was to be the head of Government and he was to preside over Cabinet meetings.¹ On the Party side, the Secretary-General was to appoint the Chairmen of sub-Committees of the Central Committee and he was to preside over the Central Committee meetings.² If these recommendations had been accepted by the Party and the Government, one of their effects would have been that UNIP would have continued to exist and operate like any other ruling political party under a multi-party system: separate and independent of but subordinate to, the Government. All these recommendations were rejected by the Party and the Government, and, instead, the powers of appointing Ministers, junior Ministers and Chairmen of sub-Committees of the Central Committee and the chairmanship of the Central Committee and the Cabinet, were vested in the President.

The NCEOPPDZ's failure to make a direct recommendation on the 'supremacy' of the Party, resulted in the absence of provisions to that effect in the Constitution (Amendment) (No. 5) Act, 1972,³ whose sec. 12A introduced the One-Party system in Zambia, or in the Constitution of Zambia Act, 1973,⁴ which contains the present One-Party State Constitution of Zambia.⁵ The feeling was that UNIP was supreme over all institutions in the land. Its supremacy ought not to be theoretical nor was it enough to merely reduce it to a constitutional provision.⁶ But legal supremacy could only be achieved through law: law asserting UNIP's central role and the much sought 'supremacy' over public institutions and

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| 1. Zambia: | NCEOPPDZ, Report, 1972, par. 57, p. 14 |
| 2. | <i>ibid.</i> paras. 146-148, pp. 46 and 47. |
| 3. | 1972, No. 1; <i>supra</i> , p. 131. |
| 4. | 1973, No. 27; <i>supra</i> , p. 133. |
| 5. | <i>ibid.</i> Art. 4. |
| 6. UNIP: | President K.D. Kaunda, opening the National Council, June 30-3rd July, 1975. |

Government came only in 1975 and in 1980 and institutionalized Party supremacy over State organs. In theory, the 'supremacy' of the Party means what it says, that is the supremacy of the political party. But in practice a political party being a body of persons pursuing political ends, 'supremacy' means the supremacy of those in the leadership of the Party. However, because the Party's legal status is unsettled and its capacity is non-existent, 'Party' supremacy would only exist as a facade for 'Presidential' supremacy: for it is the President of the Party who actually exercises the political authority of the Party. The Constitution of Zambia, however, provides for the supremacy of the decisions of the Central Committee of the Party:-

47C(1). The Central Committee shall formulate the policy of the Government and shall be responsible for advising the President with respect to the policy of the Party and the Government and with respect to such other matters as may be referred to it by the President.

(2) Where a decision of the Central Committee is in conflict with a decision of the Cabinet, the decision of the Central Committee shall prevail.¹

This provision is mis-leading because the members of the Central Committee formally participate in a collective decision-making process. That role of the Central Committee remains the same notwithstanding the recent enlargement of that organ of the Party and the inclusion of Cabinet Ministers in it.² Although members of the Central Committee are nominated by the President, once they have been formally elected as MCCs by the Party Congress, they acquire the status of elected MCCs and as such they cannot be removed from the Committee except as provided by the Constitution of the Party.³ Their status is, therefore, different from that of Cabinet Ministers who serve at the President's pleasure. The provision entrenches the 'supremacy' of the President by portraying the Central Committee as

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| 1. Zambia: | Constitution of Zambia (Amendment) Act, 1975, No. 22. |
| 2. | <u>Supra</u> , pp. 168-174. |
| 3. | <u>Supra</u> , p. 140. |

an advisory body. It is not. It is basically an elected representative body. The President is a member of the Central Committee like any other MCC, but he is primus inter pares.

Commenting on the provisions of sec. 3 of the Constitution of Tanzania, 1977, which re-organized the One-Party system in that country under CCM, it has been said that the question of party supremacy is not a meta-legal one, as it is sometimes made out. In legal theory, party supremacy "may only mean the supremacy of the decisions of the party, not the supremacy of individuals within the party".¹ This statement is, prima facie, correct; however, if Nwabueze is correct in what he says about Zambia and other former British-ruled African States, 'supremacy' is vested in individuals but only expressed through the medium of the party. He says:

the President is the government. His responsibility for it is entire and undivided. The executive power is vested in him alone, and in the exercise of it he is bound by no one else's advice. With him too lies the ultimate responsibility for policy.²

Under the One-Party system of Zambia, the President plays a role in both the adoption and the implementation of policy. There is no provision in both the Party and the State Constitution on how to resolve a conflict between a decision of the Central Committee and of the President. Because of his dominant position, the decision of the President would probably prevail over that of the Central Committee. There is no likelihood of a conflict between a decision of the Central Committee and Cabinet mainly because the President, the Secretary-General, the Prime Minister and the Secretary of Defence and Security are members of both the Central Committee and Cabinet. Secondly, now that practically all members of the Cabinet are members of the Central Committee,³ it would be ironic for the same persons

1. Kumar, U., "Justice in a One-Party African State: The Tanzanian Experience", Verfassung und Recht in Ubersee, 19, January, 1986, p. 257.

2. Nwabueze, B.O., Presidentialism in Commonwealth Africa; C. Hurst & Co. 1974, p. 175.

3. UNIP: Constitution, 1988, Art. 58(1) (b).

to be making conflicting decisions in Central Committee with those they made in Cabinet. Thirdly, under a One-Party system, there should be only one approved or official policy on any particular subject at a particular time. These factors lessen the possibility of conflict between the Central and Cabinet but they increase the strength of the supremacy of those in the leadership of the Party, in particular the President. In practice the supremacy of the Party is the supremacy of those in the leadership of the Party which is exercised and expressed in the guise of decisions of the Party.

The primary purpose of Art. 47C, aforementioned, is to 'legalize' the role of the Central Committee in the public administration of Zambia. Although Art. 4 of the Constitution of Zambia establishes a One-Party system, it does not establish UNIP which remains a 'society' under the Societies Act. Party organs are not organs of the State, consequently, any role of the Party's organ has to be expressly provided for by law, e.g. that the Party Congress elects the Presidential Candidate,¹ or that the Central Committee (now the Committee of Chairmen²) shall approve candidates for election to the National Assembly.³

So far there has been no case of the Central Committee purporting to over-rule a decision of a Minister based on legislation assigned to him for implementation: such a decision should prevail on the basis of the principle of the supremacy of Parliament. The decision of the Central Committee should, however, prevail over a Minister's decision not based on legislation, e.g. if the former directed that Party Committees be formed in every Ministry and the latter decided that no such Committee should be formed in his Ministry headquarters, the Central Committee's decision would prevail over the Minister's decision; which was a political decision.

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1. Zambia: Constitution of Zambia Act, 1973, Art. 38(3).
 2. UNIP: Constitution, 1988, Art. 85(2)(a).
 3. Constitution of Zambia, loc. cit., Art. 75(5), infra, p. 286.

The Presence of two Constitutions.

The presence of the Central Committee and the Cabinet in the Zambian administrative system is not only wasteful of human and material resources, but difficult to justify. The two bodies do not represent any such sharply differing interests that it is essential for them to be accommodated in two separate bodies, the former supposedly formulating policy and the latter executing it. The 1988 changes, under which the President can now appoint not more than twenty Cabinet Ministers (the Cabinet is composed of a maximum of sixteen Ministers) to the Central Committee,¹ makes nonsense of the distinction. The presence of the two bodies, however, is tied up with the presence of two Constitutions; one for the Party and the other for the State. The presence of the Party and the State Constitutions is both historical and legal. UNIP, in accordance with the provisions of the Societies Ordinance, 1957, had to adopt a written Constitution at its inception. That law is still in force and requires that the Party maintains a written Constitution. Supremacy of the Party, however, has not meant that the Constitution of the Party becomes superior to that of the State or that the Party becomes synonymous with the State; hence, the following observation of the Court in the case in which the question arose as to whether in a One-Party State the State's Attorney-Government can represent the ruling Party:-

I cannot, with greatest respect, say that the United National Independence Party forms the State (the Sovereign Republic of Zambia). I am strengthened in in this view by the very existence of two different Constitutions, namely the Republican Constitution and the Constitution of the United National Independence Party. If the United National Independence Party were the State why two separate Constitutions?²

The UNIP Constitution, however, is not a 'state' or 'national' constitution embodying national sentiments; it is at law a set of rules on the management of a 'society' registrable with the Registrar of Societies.

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1. UNIP: Constitution, 1988, Art. 58(1)(d), supra, p. 143.
 2. Nkumbula and Kapwepwe v. UNIP (1978) ZR 378, per Sakala, J., at p. 384, supra, p. 153.

The dichotomy of the Central Committee and Cabinet (and the requirement that the decisions of the former should prevail over the decision of the latter) and the presence of the two Constitutions, could be ended by a fusion of the two bodies and of the two Constitutions. Mainza Chona's view that the presence of the two Constitutions did not matter,¹ was based on British experiences, where party functionaries and organs as such, do not play any role in the administration of the country. The same could be said of the American party system. The Charter of the Democratic Party, adopted in 1972 and amended in 1981,² and the Rules of the Republican National Party adopted in July, 1980,³ do not play the same role as that played by the UNIP Constitution. In Zambia the Secretary-General occupies and plays roles similar to those played by the Vice-President in other constitutional systems. And yet he operates mainly under the Constitution of the Party.

In Angola,⁴ Mozambique,⁵ and Zaire,⁶ there is only one Constitution that provides for the administration of the State (the Government) and the Party, namely the MPLA-WP, FRELIMO and MPR, respectively. The separation of the officers holding the post of Chairman of CCM and the office of President of Tanzania, introduced in 1984, might be indicative of some opposition to a fusion of the Constitutions and of the roles of the Party and the Government.

Reform of governmental institutions is a continuous process. In the meantime, the two-Constitution-arrangement with its corollary of the supremacy of the decisions of the Central Committee, provides a flexible situation in the event of a reversion to a multi-party system in the future or a separation in the leadership of the Party and of the Government.

1. Chona, M.M., Appendix 'A', pp. 538-551, Answer to Question 10 at p. 549.

2. Harmel, R. and Janda, K., Parties and Their Environments: Limits to Reform? Longman, N.Y., 1982, Appendix 'B', p. 154.

3. ibid. Appendix 'C', p. 163.

4. Angola: Constitution, 11th November, 1975, Arts. 31-51.

5. Mozambique: Constitution, 25th June, 1975, Arts. 37-53.

6. Zaire: Constitution, 15th February, 1978, Arts. 87-93. On the effect of the combination, see Callaghy, T.M., The State-Society Struggle: Zaire in Comparative Perspective; Columbia UP, N.Y., 1984.

Section 2. Party Functionaries in Public Administration.

One of the changes necessitated by the One-Party system in Zambia, was the abolition of the office of Vice-President and the re-introduction of the office of Prime Minister. The Prime Minister was relegated to a third place with the Secretary-General of the Party assuming the position of the second-in-command to the President. The Secretary-General is appointed by the President and he is responsible for Party administration,¹ while the Prime Minister, also appointed by the President, is responsible for Government administration.²

Whenever the office of President becomes vacant (which has so far not occurred since Independence), or the President is temporarily out of the country (which occurs often), or if he should be ill or he is incapable by reason of physical or mental infirmity of discharging the functions of his office, the Secretary-General performs the functions of the President.³ When the President dies or is removed from office, the Secretary-General becomes the Acting President,⁴ but only for a maximum period of three months during which period the vacancy should be filled. The Acting President is not allowed to dissolve Parliament or revoke any appointment made by the former President.⁵ Where there is no Secretary-General, the Central Committee (after 1988 the Committee of Chairmen) selects an MCC to act as the Secretary-General who consequently becomes the Acting President until the person elected as President assumes office.

These provisions are intended to ensure that the Party and not the Government, is the source of the top leadership, hence only the Secretary-General or an MCC and not the Prime Minister can become Acting President. That is an aspect of the 'supremacy' of the Party.

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| 1. UNIP: | Constitution, 1988, Art. 77. |
| 2. Zambia: | Constitution of Zambia Act, 1973, Art. 48(1). |
| 3. | <u>ibid.</u> Arts. 40(3) and 43. |
| 4. | <u>ibid.</u> Art. 42(2). |
| 5. | <u>ibid.</u> Arts. 42(3) and 43(2), proviso. Similar provisions are contained in UNIP Constitution, 1988, Arts. 75 and 76. |

The procedure for the removal of the President shows that it is the Party and not the Government which initiates the removal. A joint Central Committee and Cabinet meeting, chaired by the Secretary-General, has to resolve by a motion, supported by the votes of the majority of the joint session, that, for instance, the question of the physical or mental capacity of the President to discharge the functions of his office, should be investigated. The investigation is carried out by a board consisting of three medical practitioners appointed by the Chief Justice. If the board reports that the President is, in its opinion, incapable of discharging his official duties, the Chief Justice should in writing certify accordingly.¹ On paper there are sufficient provisions and procedures for a peaceful removal of a President from office either on grounds of ill-health or misconduct, however, these have not been put to a test, yet. President Kaunda has enjoyed good health and hard-working.

Since the establishment of the One-Party system three persons have held the office of Secretary-General: Alexander Gray Zulu (1973-1976), Mathias Mainza Chona (1976-1981) and Humphrey Mulemba (1981-1985). In 1985 A.G. Zulu was re-appointed Secretary-General and he is still in office at the time of writing (1989). During the same period five persons have been appointed Prime Minister, namely M.M. Chona (1973-1976), Daniel Lisulo (1976-1981), Nalumino Mundia (1981-1985), Kebby Musokotwane (1985-1989) and Mulimba Masheke, 1989² and still in office at the time of writing. The President has a firm control of the Party and Government top leadership to the extent that appointments and removals of these leaders are carried out at his pleasure and as a matter of course. The Cabinet is composed of the President (as Chairman), the Secretary-General, ex-officio, the Secretary of Defence and Security and about sixteen Ministers: all appointees of the President. That is the apex of the public administration in which Party functionaries are deployed and the Party plays its role.

1. Zambia: Constitution of Zambia Act, 1973, Art. 40(2); and the President ceases to hold office, infra, p. 333.
 2. Appointed 15th March, 1989.

(a) The Secretary-General in Public Administration.

One of the fascinating things about the One-Party system is the persistence of the demarcation between those belonging to the 'Party' and those in the 'Government'. The provisions of the State's Constitution on the 'supremacy' of the Party decisions considered in the previous Section and the provisions on the role of the Secretary-General in public administration considered in this Section, are all based on the notion that the Prime Minister and Ministers do not represent the Party. Views are expressed in the Party circles to the effect that even the President (of the Party), once sworn-in as the President of the Republic, 'ceases to represent the Party' but personifies the Government and the State. Accordingly, the role of the Secretary-General in public administration is perceived as symbolizing the presence of the Party in Government administration.

A close observation of the manner each of the men who have held the office of the Secretary-General has conducted his public administration duties, gives the impression that each one of them believed that he carried out such functions as a representative of the Party. That belief could be based on the fact that he carried out such duties ex-officio - by virtue of being Secretary-General of the Party. However, the Secretary-General performs such duties as are assigned to him by the Constitution of Zambia as the second-in-command to the President.

(i) Chairmanship of Cabinet.

The chairmanship of Cabinet by the Secretary-General runs counter to one of the basic principles pronounced at the inception of the One-Party system, that supreme power ought to be vested in the people, exercised by them directly where possible, and indirectly through established democratic representative institutions.¹ The Prime Minister

1. Zambia:

NCEOPPDZ, Report, 1972, Appendix I, Seventh terms of reference; p. 69.

being the head of Government administration, is, prima facie, the appropriate officer to chair a Cabinet meeting in the absence of the President. The fact that the Secretary-General who is not a member of Parliament, can preside over Cabinet is significant in itself. These provisions assert the 'supremacy' of the Party over Government administration. This conclusion is supported by the fact that the Constitution of UNIP does not afford the Prime Minister, who is an ex-officio member of the Central Committee, a similar role, that is, the chairmanship of the Central Committee in the absence of both the President and the Secretary-General.

Although the Secretary-General can preside over a Cabinet meeting, he is not empowered to play any role in the administration of the Government; the Prime Minister is the head of Government administration. The office of the Secretary-General is not a 'public office'. A 'public office' is an office of emolument in the public service of Zambia but excludes an office constituted by the President and declared by him not to be an office in the public service.¹ Although the Secretary-General receives his monthly salary and allowances from the Ministry of Finance, his office is not an office in the public service nor created by the President. His office is an office under the Constitution of the Party. In Chipimo v. Chona, The Secretary-General of UNIP and Attorney-General² the Supreme Court rejected the plaintiff's contention that under Zambia's One-Party system the office of the Secretary-General should be equated to that of the Attorney-General and cited as such in litigation. The Secretary-General chairs a Cabinet meeting by virtue of authority vested in him by the Constitution of Zambia. This is another incident in which the Party has used the law to assert its presence of public administration.

1. Zambia:

Constitution of Zambia Act, 1973, Art. 62.

2. (1983) ZR 125.

(ii) Consultation on Important Appointments.

The introduction of the One-Party system has resulted in the identity of the Party permeating the Constitution of Zambia; for example, the President is required to consult the Secretary-General on making ministerial appointments¹ and on the appointment of the Attorney-General.² He is not required to consult the Secretary-General or the Prime Minister or anyone on the appointment of the (next) Secretary-General or the Prime Minister. Consultation was intended to establish 'collective responsibility' in the deployment of personnel in the leadership of the Government and to avoid the concentration of appointment powers in the President alone. It was anticipated that when consulted, the Secretary-General would in turn consult those in the leadership of the Party, e.g. chairmen of sub-Committees of the Central Committee.³ Conversely, in the absence of consultation, the decisions of the President would be seen as his own. In the appointment of public officers, on the other hand, the President was to be assisted by the various Service Commissions.

To 'consult' means in this context, to seek information or advice from a person or to take counsel with the source consulted or to take into consideration the views of the source consulted. The Constitution does not indicate or provide the manner the consultation has to be carried out. The consultation can, therefore, be formal, e.g. in writing or informal, e.g. a verbal consultation on the State House golf-course. On both occasions, however, consultation should be before the appointment is made, otherwise if made after the appointment has already been made it would become a matter of being informed of the President's action.

One of the former Secretaries-General's experience of the implementation of the provisions of the Constitution on consultation

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| 1. Zambia: | Constitution of Zambia Act, 1973, Art. 48(4). |
| 2. | <u>ibid.</u> Art. 57(1). |
| 3. UNIP: | Constitution, 1978, Art. 54, now called Sub-Committees of the Committee of Chairmen; Constitution, 1988, Art. 65(1); <u>infra</u> , p. 219. |

between the President and the Secretary-General was that consultation was carried out but that because of the dominant position of the President, such consultations did not curtail his powers:-

As for the present powers of the President in our Constitution, on paper, they do not appear too wide. There are provisions for consultation. If these consultations continue to take place, they are not too wide. Otherwise they are. The leadership changes in February, 1981 and April, 1985, (when both the 'No. 2' and 'No. 3' were suddenly replaced at one time without sufficient reasons) proved that under our Constitution only one person was in charge. There seems to be no collective leadership as was thought to be the case. There was no longer a real No. 2 or No. 3 as any of them can be removed at the stroke of the pen.¹

This observation reveals that there is no want of consultation between the President and the Secretaries-General but it also reveals an element of discontent with certain aspects of the consultation. In theory - and this is an area where law and practice diverge - the provisions are there² and it would be quite legitimate and lawful for a Secretary-General who was not consulted on a matter on which he should have been consulted, to gather enough courage and raise the matter with the high authority. In practice, and in the political context, such a query might be construed as a challenge to the executive authority. Since the Secretary-General is appointed by the President and serves at 'his pleasure', the possible consequence of such a confrontation might be the removal from office of the Secretary-General. The successful implementation of the consultation provisions, therefore, depends on the nature of the relationship between the President and each of the Secretary-General which could either be comradely, e.g. between President Kaunda and Secretary-General Gray Zulu, or merely cordial, e.g. that which existed between Kaunda and Secretary-General Humphrey Mulemba. It is pertinent to point out that, first, the President is not required to consult anyone on the appointment or removal of the Secretary-General of the Party or the Prime Minister: he acts on his own discretion. In the second place, it

1. Chona, M.M., Appendix 'A', Answer to Question No. 8, infra, p. 546.

2. Zambia: Constitution of Zambia Act, 1973, Arts. 48(3) and 57(1).

would be difficult to consult a Secretary-General on his own removal from office. The UNIP Constitution of 1973, for instance, had provided, among other things, that MCCs considered and approved their own re-election to the Central Committee.¹ That provision was retained in the Constitution of 1978 but proved unworkable.² There were reports of certain MCCs simply refusing being removed from the Central Committee! Accordingly, in 1983 that provision was quietly removed from the Constitution; it is now provided that the President alone decides the composition of the Central Committee and submits his 'list' of candidates to the National Council for approval.³ It is unlikely that a Secretary-General consulted on his own removal from office would gladly agree to go.

It is pertinent to point out that what might appear as prima facie 'dictatorial' attitude of the President, in the manner he appoints and reshuffles or dismisses leaders in the Party or Government, is, to some extent, as a result of constitutional provisions which make the President the real authority on whom all power is vested. The Constitution (Amendment) (No. 5) Act, 1972⁴ and the Constitution of Zambia Act, 1973,⁵ did not contain any provisions on consultation between the President and the Secretary-General on any matter including ministerial appointments. The requirement of consultation was introduced in 1975⁶ by which time the President had already acquired a dominant role in the administration of the affairs of both the Party and the Republic. The people of Zambia are generally humble and law-abiding and less disposed to political conflict or confrontation. That provides the environment within which consultation is supposed to be conducted. In addition to that, the political system is

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| 1. UNIP: | Constitution, 1973, Art. 8(4)(ii); <u>supra</u> , p. 141. |
| 2. | Constitution, 1978, Art. 53(3)(a). |
| 3. | Constitution, 1983, Art. 53(3)(a), now Art. 60(3), Constitution, 1988. |
| 4. Zambia: | 1972, No. 1. |
| 5. | 1973, No. 27. |
| 6. | Constitution of Zambia (Amendment) Act, 1975, No. 22, Arts. 48(4) and 57(1). |

dominated by the established principle that the executive power of the Republic is vested in the President and that upon the exercise of any function conferred upon him by the Constitution or any other written law, the President shall, unless it is otherwise provided, act in his own deliberate judgement and shall not be obliged to follow the advice tendered by any person or authority.¹ Notwithstanding the qualification - unless it is otherwise provided - in practice the emphasis is placed on the fact that the President is not obliged to follow any advice tendered by any person or authority. Consultation under such circumstances might appear to be of no practical value since the President is empowered to ignore any advice and act as he sees fit.

A president, however powerful, cannot know everything and everybody in his country. In Zambia President Kaunda because of his long leadership of the Party and the Government has come to know so well personally most of those in the leadership of the Party and Government that he has been able to appoint, promote, reshuffle, demote or dismiss or re-appoint persons without consultation with any person or authority.² That has included the appointment and dismissal of Secretaries-General, Prime Ministers, Ministers, Army Commanders and public servants in the Government and parastatal organizations. The President, however, does consult the appropriate authorities in the deployment of public servants.

The One-Party system in Zambia is supposed to be based on the principle of the Party and its Government and not of the Party and the Government. The consultation between the President and the Secretary-General was aimed at fusion of the appointing authority for Party and Government leaders. The dominant authority, however, is the President.

1. Zambia: Constitution of Zambia Act, 1973, Art. 53(2).

2. Good, K., "Zambia: Back into the future", Third World Quarterly; Vol. 10, No. 1, January, 1988, pp. 37-38.

In as far as performance of official functions is concerned, the provision that junior ministers (Ministers of State) assist the Secretary-General in the discharge of his functions¹ has no bearing on what goes on in practice. It is interesting to note that that provision does not apply to Ministers. In practice Ministers of State do not 'assist' the Secretary-General in Party matters. Probably that provision was intended to refer to those situations when the Secretary-General is performing the functions of the President; in which case he would expect to be assisted by Ministers and Ministers of State, as well as by public servants.

(b) The Secretary of State for Defence and Security: a Hybrid.

President Kaunda announced the creation of the office of Secretary of Defence and Security, to be referred to for short simply as the Secretary for Defence, at the Eighth General Conference of the Party held in September, 1978, and the office was accordingly included in the Party Constitution adopted at that Conference.² The office is basically an office in the Party, and the holder, appointed by the President, is an MCC and ranks fourth in the State order of precedence. The impression at the time of its creation was that the office of the Secretary of Defence was to provide political leadership to the armed forces. The office was established at the peak of the liberation war in the then SR, to-day's Zimbabwe. The first appointee to the office was the then Secretary-General, Alexander Gray Zulu. The Secretary of Defence is deployed in Government administration, that is he occupies an office within the Government's Ministry of Defence, with the Minister of Defence operating under him. But he is a UNIP official and his official correspondence is on UNIP stationery.

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| 1. Zambia: | Constitution of Zambia Act, 1973, Art. 56(3) as amended by the Constitution (Amendment) Act, 1975. |
| 2. UNIP: | Constitution, 1978, Art. 56(2). |

Under Zambia's system of administration based on a written State Constitution, it is difficult to evolve important 'conventions' of the Constitution similar to those evolved under the unwritten English Constitution. Ideally, the role of the Secretary of Defence in the administration of the Government would have been left to operate on the basis of the Party's wish to deploy one of its leading cadres in the service of the State. Under the written Constitution of Zambia such deployment could not be done on the basis of a 'convention': it had to be expressly provided for by the Constitution. The Constitution had, therefore, to be drastically amended to implement the Party's policy of deploying the Secretary of Defence in the administration of Zambia.

The Secretary of Defence is responsible, under the direction of the President, for the business of the Government relating to defence and security, including the administration of any department of the Government, as the President, in consultation with the Secretary-General and the Prime Minister, may assign to him.¹ He can convene a meeting of the Central Committee or Cabinet in the absence of the President, the Secretary-General and the Prime Minister,² and, if and when the Prime Minister is out of the country or is incapable of discharging the functions of his office by reason of illness or other cause, the Secretary of Defence performs the functions of the Prime Minister.³ The Prime Minister, however, cannot perform the functions of the Secretary of Defence in the latter's absence from Zambia or illness or incapacity. That reveals that the arrangement is intended to project the presence of the Party in Government administration and not vice versa. Also by the fact that the Ministry of Defence and the Minister of Defence are

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1. Zambia: Constitution of Zambia Act, 1973, Art. 55A as amended by the Constitution (Amendment) Act, 1980, No. 10, Art. 3.
 2. ibid. Art. 40(4) as amended.
 3. ibid. Arts. 49 and 50, as amended

placed under the Secretary of Defence, shows that the arrangement was devised as an aspect of the 'supremacy' of the Party over Government administration. The point to note, however, is that the deployment of the Secretary of Defence was not accomplished as a matter of a political fact, but had to be achieved through law. That resort to law might be said to have been inevitable under Zambia's written Constitution. On the other hand, it could be argued that the Party, being aware of its rather unclear legal capacity, had no alternative but to utilize the law in asserting its supremacy - that is of its functionaries - over Government administration. In fact it is a combination of these two factors: a written State Constitution and UNIP's lack of precise legal capacity. The presence of the Secretary of Defence in Government administration between 1978 and 1980, before the amendments to the Constitution of Zambia, was not different from that of the SPPRA and Political Assistants in Government administration before the One-Party system was introduced, whose presence in government administration was not backed by law.¹ The Secretary of Defence could have continued in Government administration without legal backing. Under the One-Party system the Party's strategy has been to utilize the law in asserting the role of its organs such as the Central Committee or its leading functionaries such as the Secretary-General and the Secretary of Defence. The constitutional provisions provide the legal basis for the Party's intervention in administrative activities: the Party providing the 'correct political line' for the Government officers.

There were two main ways through which UNIP could have used in its bid to control Government administration. It could either have deployed its functionaries in the administration itself (who would control the administration from inside), or, placed government officers

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Supra, p. 189.

in Party organs (to which they reported the workings of their public institutions and from which they got instructions on how to run their institutions). The roles of the Secretary-General and the Secretary of Defence show that UNIP has opted for the former approach. One of the reasons for adopting the former method is that the two Party leaders work under, and report to, the President of the Party and the State. If the latter method were adopted (which would be more beneficial to the Party) officers would report not to the President, but to the Party organs of their assignment. That would run counter to the present all-embracing dominant role of the President.

The office of the Secretary of Defence is now a public office in the administration of the Government of Zambia; prima facie, an MCC or any other person can be appointed the Secretary of Defence. The Secretary of Defence is a public officer and he does not hold his office ex-officio, that is by virtue of being an MCC, but through the appointment by the President, under the Constitution of Zambia. There is, therefore, a difference in status vis-à-vis their role in public administration between the Secretary-General and the Secretary of Defence. The former sits in Cabinet ex-officio, that is by being Secretary-General of UNIP.¹ The latter sits in Cabinet and holds his office by virtue of his appointment by the President. If and when the Central Committee is dissolved or he otherwise ceased to be an MCC, the Secretary of Defence would continue to hold that office until removed by the President. The Secretary-General's membership of Cabinet ceases immediately he is removed from that office or the Central Committee is dissolved. The office of the Secretary for Defence is, therefore, a hybrid post in the constitutional system of Zambia in that it is an office in the Government administration held by a Party official.

1. Zambia:

Constitution of Zambia Act, 1973, Art. 50(1).

Section 3. The Party and the Civil Service.

The Background.

The Colonial Civil Service in NR was, broadly speaking, divided into two divisions; the Colonial Civil Service composed of British overseas officers, and the African Civil Service, composed of locally recruited African low rank officers. No African held a high civil service post in NR until after Independence. African civil servants were forbidden from participating in politics.¹ During the peak of the nationalist agitation for one-man-one-vote and self-government, Africans in the civil service and those joining the Service were made to sign a declaration to the effect that their attention had been drawn to the requirement that they did not take part in political activities.² Any African civil servant who, contrary to his undertaking not to participate in politics, did participate in politics, was subject to disciplinary action, which in some cases meant instant dismissal from the Service, hence the NRANC's complaint to the authorities against dismissals from the Service of Africans who supported the organization's campaign for self-rule.³

Following Independence, UNIP called for patriotism among the newly Zambianized Civil Service to serve loyally an African Government. The Party appeared unimpressed by the support that call received from the civil servants, hence in 1968 UNIP activists were deployed in government administration and in the Parliamentary General

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1. NR: Establishment Minute No. TSN. 127(E), 22nd May, 1953, Rule 9.
 2. Establishment Minute No. TSN. 127 (E), 26th May, 1960, African Civil Service Form C.S. B55, issued by A.B. Shone, Chief Establishment Officer.
 3. See, supra, p. 67; African National Congress, B/5-291, NR 11/158; NAZ-L, supra, p. 67.

Election of that year, UNIP fielded some civil servants as candidates. Some civil servants were nominated to Parliament. In 1969 an amendment was effected to the Constitution of Zambia whereby, in exercise of the powers vested in him of constituting or abolishing offices in the public service of the Public, the President could declare that any office constituted by him shall not be an office in the public service.¹ President Kaunda created the office of the DG and declared that that office was not an office in the public service. An appointment to such an office was made by the President without consultation with the Public Service Commission or any other authority; consequently, the President was enabled to appoint UNIP activists into the public service; mainly to provide 'political leadership' and to establish the Party's presence.

Although it has been said that the Zambian civil service was already politicized at Independence,² in reality there was not much of a 'Zambian' civil service at Independence; that only began to emerge after the intensification of the Zambianization programme after 1968. Secondly, the British restrictions on Africans working for the colonial government participating in politics, and the presence of a multi-party system, encouraged some form of neutrality on the part of the civil servants.

(a) The Relationship between the Party and the Civil Service.

The Constitution of UNIP of 1973 - annexed to the One-Party Constitution of Zambia - dealt purely with Party matters and did not refer to the State, Government or parastatal institutions.³ The functions

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- 1. Zambia: Constitution (Amendment) Act, 1969, No. 1, sec. 56(1), now Art. 62 of the Constitution of Zambia Act, 1973, No. 27.
 - 2. Pettman, J., "Zambia's Second Republic - the Establishment of a One-Party System", JMAS, 1974, p. 231.
 - 3. UNIP: The 1973 Constitution was repealed and replaced at the 8th General Conference held in September, 1978.

of the President, the Party Secretary-General and the Committee of Chairmen's sub-Committees did not include the supervision of State institutions or parastatal organizations. Following the establishment of the One-Party system agitation began formally to bring the public service under the leadership of the Party. The relationship between the Party and the civil service, for instance, was spelt out in the following statement:

We agreed that the Party is supreme. We agreed that the cause of the Party is the cause of the masses. But our major task is still to make the administration efficient. The Party's administration has not asserted its position as the leading force in the nation. On the other hand there are still a few members of the Public Service who tend to consider themselves as institutions apart. These nurse the colonial ideas of an independent civil service, yet there is no independent civil service in the world. Time has come to make the Public Service part of UNIP, its leading force. By virtue of their employment, the Public Service owes allegiance to UNIP, members of the Service are bound by the Philosophy, principles and objectives of the Party; they are bound by its Code of discipline. We therefore, must integrate the Party and Government machinery so that all the cadres in the Party and the Public Service can truly form one dynamic cooperative enterprise geared to run and develop Zambia.¹

The 'agreement' - or appropriately the decision - that the Party should be supreme was that of the Party rather than of the nation as a whole. The purported rejection of a non-political and neutral public service was expressed through the provisions of the Party Constitution adopted at the Eighth General Conference held in August, 1978 which provided, inter alia, that the cause of the Party 'is the cause of the people', that the Party should ensure that all public institutions, State-owned enterprises and similar organizations are led by members of Party,² that the Party was the supreme organization and the guiding political force in the land,³ and that the Party exercises disciplinary powers over, among others, public servants.⁴ Thus, deliberately, the

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| 1. UNIP: | President K.D. Kaunda, Opening Speech at the 8th National Council, 27th-29th April, 1975. |
| 2. | Constitution, 1978, Art. 3. |
| 3. | <u>ibid.</u> Art. 5. |
| 4. | <u>ibid.</u> Art. 55(F) and Reg. 37(a). |

Constitution of the Party tried to extend Party influence to the public service. For instance, the Appointment and Disciplinary sub-Committee of the Central Committee was made responsible for the discipline of, among others, heads of Zambian missions abroad, some of whom are civil servants, all officers of and above the rank of Assistant Secretary in the Party and Government, all officers of and above the rank of High Court Judge including the DPP and all officers of and above the rank of General Manager of parastatal organizations.¹ In addition to that all Permanent Secretaries and Under-Secretaries who were members of the Party - and almost all of them were members of the Party - pay, on the basis of pay-as-you-earn, two-and-half percent (2½%) of their salaries exclusive of allowances, as monthly contributions to the Party.²

The relationship between the Party and the Public Service, however, remained that of a political party and the Government. The Government as an institution continued to be composed of Ministries and departments run by Ministers, Ministers of State and civil servants. Civil servants deployed in the Party service enjoyed no special status and did not lose their status of public officers. In spite of the provisions of the Constitution of the Party, the Party's Appointments and Disciplinary sub-Committee did not exercise disciplinary jurisdiction over the stipulated public officers. In practice there was no way in which that sub-Committee could discipline, for example, Assistant Secretaries and Judges in the public service of the Republic because their conditions of service were regulated by the provisions of the Constitution of Zambia and regulations made thereunder.³ The Appointments and Disciplinary sub-Committee, however, exercises disciplinary powers over civil servants on secondment to the Party service. The Party's actions, however, are subject to confirmation by the Public Service Commission.

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1. UNIP: Constitution, 1978, Reg. 37(a) (i) to (iv).
 2. ibid. Reg. 95(e) now Reg. 69, Constitution, 1988.
 3. The Attorney-General v. Kang'ombe (1973) ZR 114.

There was some discontent in the public service with the Party's interference in the discipline of public servants. However, a number of public servants dissatisfied with decisions of a Service Commission or the Investigator-General, 'appealed' to the Party for the settlement of the matter in dispute. Between 1978 and 1987 the Appointments and Disciplinary sub-Committee of the Central Committee formally reviewed decisions: some decisions were upheld and others were referred back to the Commission concerned, with an 'advice' that the Commission reconsider its earlier decision. A public officer who had his disciplinary action reversed, following such an intervention, was bound to applaud the close relationship between the Party and the public service. However, Party intervention contributed towards some indiscipline in the public service; some public servants with strong political connections were becoming 'untouchables'.

The Party Constitution adopted at the Tenth Party Congress in August 1988 has accordingly left out from the Constitution of the Party, any references to public servants, including judges and the DPP, in the category of persons over whom the Party might exercise disciplinary powers.¹ The provisions regarding compulsory monthly contributions to Party funds by public servants, among others, have been retained.² The relationship between the Party and the public service after the 1988 Party Congress is, vis-à-vis disciplinary matters, that of a political party and a Government administration as described by President Kaunda in 1975.³ This conclusion should, however, be made subject to one important qualification, namely that the Party might exercise more influence over the public service through the Party Control Commission established by the 1988 Party Constitution.⁵

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| 1. UNIP: | Constitution, 1988 Art. 64(3)(F)(d) and Reg. 15 |
| 2. | <u>ibid.</u> Art. 86 and Reg. 69(f). |
| 3. | <u>Infra</u> , p. 222. |
| 4. | Constitution, 1988, <u>loc. cit.</u> , Art. 66. |
| 5. | <u>Infra</u> . p. 228. |

(b) The Party and the Service Commissions.

The Constitution of Zambia provides that the executive power of the Republic shall vest in the President and shall be exercised by him either directly or through officers subordinate to him.¹ The power to appoint persons to hold or act in any office in the public service of Zambia and to exercise discipline over such persons vests in the President, however, before exercising such power the President is required to consult a number of Service Commissions who actually exercise the powers of the President on a delegated basis.² The Commissions are the Public Service, the Police and Prison Service, the Teaching Service and the Judicial Service Commissions. Each of these Commissions consists of a Chairman and a number of prescribed members appointed by the President. Members of Parliament and public officers are not qualified to be appointed members of a Commission and UNIP has refrained from direct representation on the membership of the Service Commissions. Service Commissions are regarded as State institutions and their functions are extensions of the executive authority of the President, who, however, is the President of the Party. But the President does not exercise his appointment powers as the leader of the Party but under authority granted him by the Constitution of Zambia. Thus, in Chanda v. Attorney-General,³ the plaintiff was a prominent 'freedom-fighter' and an MP, who was sent into foreign service through a letter signed by the Permanent Secretary, Ministry of Foreign Affairs, Lusaka. The letter did not reveal the appointing authority. On his recall to Zambia, the plaintiff was placed under a Presidential detention order and subsequently dismissed from the public service.

1. Zambia: Constitution of Zambia Act, 1973, Art. 53(1).

2. ibid. Art. 132.

3. (1975) ZR 56.

The Court held that (it could be presumed) the appointing authority was the President and not the Permanent Secretary and that the plaintiff held a 'public office' and he was a 'public officer', but that he did not hold an office constituted by the President and declared by him not to be an office in the public service. However, ambassadors and high commissioners being appointees of the President, served at his pleasure and could be dismissed by him as he saw fit.¹

The President is bound to 'interfere' with the functions of the Service Commissions since he is empowered to give the Commissions such general directions with respect to the exercise of their functions as he considers necessary and the Commissions are expected to comply with such directions. The role of the Commissions is, however, outside the realm of the Party, except as observed earlier, that the President is also President of the Party. The Party, however, maintains a close link with the Chairmen of Commissions, for example, with the exception of the Chairman of the Judicial Service Commission (the Chief Justice), all chairmen are appointed as advisors to sub-Committees of the Chairmen's Committee. The Deputy Chief Justice is the Chairman of both the Party and State Electoral Commissions.

In retrospect, UNIP was more active in 'interfering' with the public service during the multi-party system than under the One-Party system. There is under the latter system no fear of public servants supporting another or other political party or parties. Today the public service's neutrality has been broken and public servants have been compelled, by the prevailing circumstances of a One-Party system, to submit to the dominant role of the Party. The changes in the Party Constitution adopted at the 1988 Party Congress,² however, suggest that the Party has failed to integrate Party and Government machinery and that the public service stands as an institution apart.

1. Chanda v. Attorney-General (1975) ZR 56, at p. 61.

2. UNIP: Constitution, 1988, Art. 65(3)(F) omits reference to civil servants vis-a-vis Party discipline.

Section 4. The Party 'Control' of Government Ministries.

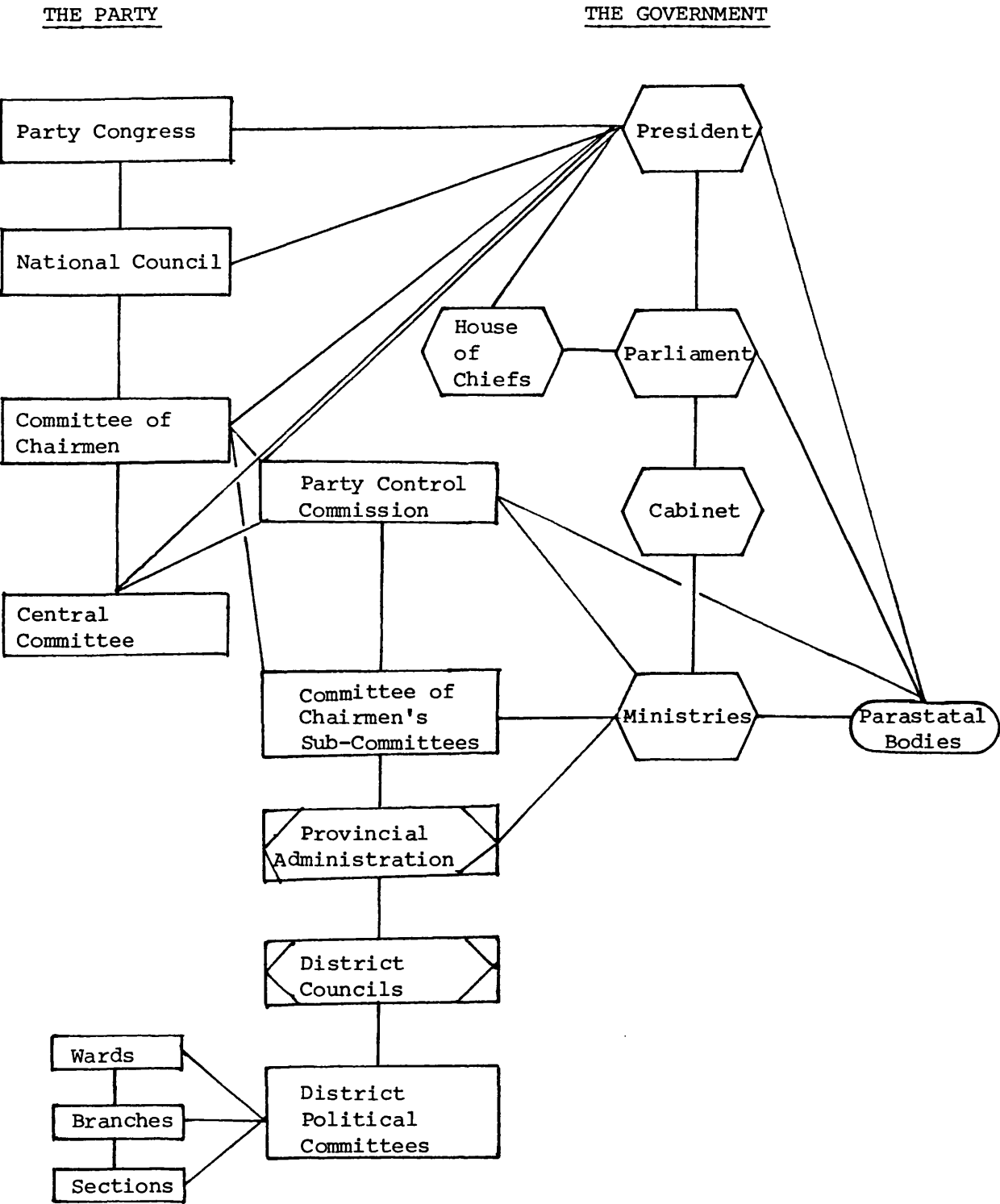
One of the consequences of the evolution of the concept of the Party and its Government has been that the Party hardly criticises the Government and vice versa. This lack of criticism is not influenced by the stated political line of the Party that the Party should have confidence in workers and peasants in every field, whether Party or Government officials, office, mine, factory or construction workers or teachers.¹ Lack of criticism arises from the fact that Party criticism of the Government would be tantamount to self-criticism. Government criticism of the Party would, on the Party's side, be viewed as an attempt by the Government to institute itself as a body independent of the Party. Although the Party leadership has faith in its Government, it still feels it should maintain a close constant view of the work of the Government Ministries and Departments.


So far, there is no known Government body that monitors the role of the Party in Zambia. Members of the National Assembly have in the past tried to point out defects in the role of the Party under the protective ambrella of Parliamentary privilege. But such criticisms have resulted in the outspoken M.P.s being vetted from returning to the House.²

The Party control of the Government ministries is not based on any specific legislation. In Party circles, the provisions of Art. 47C(2) of the Constitution of Zambia, which provides that where a decision of the Central Committee is in conflict with a decision of the Cabinet, the former should prevail over the latter, is cited as the authority for the supervision of Government ministries.³ That is of course stretching the provisions beyond their intended purpose. The following page shows the relationship between the Party and the Government in a graphic form.

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1. UNIP: President Kaunda, Opening the National Council, 30th June-3rd July, 1975, see The 'Watershed' Speech, p. 7.
 2. Infra, p. 286.
 3. Supra, p. 190.

FIGURE I: The Relationship between the Party and the Government.



Note: symbol  indicates that the body is composed of Party and Government representatives. Members of the House of Chiefs are elected by the Chiefs Provincial Councils and they discuss Bills referred to them by the President: Constitution of Zambia Act, 1973, Art. 96.

(i) Ministries under Chairmen of Committees Sub-Committees.

The placement of Government Ministries under sub-Committees of the Committee of Chairmen could be said to be based on a 'convention' which is taking root that Ministries operate under one of the Chairmen of Committees sub-Committees. For instance, when the Ministry of Presidential Affairs was established in 1986, it was immediately placed under the then Political and Legal sub-Committee.¹ Under the unwritten British Constitution a distinction is drawn between laws and conventions. Laws are rules which are enforced by the courts. The conventions (of the Constitution), however, presuppose the law and they play an important role in the British Parliamentary system.² Necessarily conventional rules spring up to regulate the working of the various organs of government, their relations to one another and to the subject.

Under the 1978 Party Constitution sub-Committees fell directly under the Central Committee.³ The enlargement of the Central Committee at the Tenth Party Congress from 25 to 68 members necessitated the placement of the ten sub-Committees under the Committee of Chairmen of sub-Committees chaired by the President.⁴ The President appoints the Chairman and Vice-Chairmen and members of the sub-Committees who should be members of the National Council⁵ and not more than six advisors to each of the sub-Committees, who need not be members of the National Council.⁶ Advisors are drawn from the Churches, trade unions, women's and youth organizations and institutions of higher learning and their presence on the sub-Committees is intended to expose Party policies to outside lobby or opinion or scrutiny. Advisors often play an important role in advising sub-Committees, e.g. by pointing

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1. UNIP: Constitution, 1988, Art. 65(1) omits that Ministry which was reported abolished: Times of Zambia, 3rd November, 1988.
 2. Jennings, I., The Law and the Constitution; Hodder & Soughton, Cambridge, 1976, Fifth ed., p. 103.
 3. UNIP: Constitution, 1978, Art. 55(1).
 4. UNIP: Constitution, 1988, Art. 65(1).
 5. ibid. Art. 65(1)
 6. ibid. Art. 65(2).

out some short-comings in Party policies and practices, something which Party functionaries are often reluctant to do in committees. Each of the sub-Committee's Chairman and Vice-Chairman are MCCs. All the sub-Committees operate under the overall supervision of the Secretary-General of the Party. The allocation of Government Ministries is as follows:-

<u>Sub-Committee of Chairmen of Committees</u>	<u>Government Ministry</u>
Defence and Security	Home Affairs Defence
Political, Ideological and Legal	Legal Affairs Foreign Affairs National Guidance
Economic and Finance	Finance and Planning Mines Tourism Power, Transport and Communications Commerce and Trade
Elections and Publicity	Broadcasting and Information
Rural Development	Agriculture and Co-operatives Water, Lands and Natural Resources
Social and Culture	Labour, Social Services and Culture Health General Education, Youth and Sport
Appointments and Disciplinary	Service Commissions
Youth and Sport	Youth Department, Labour and Social Services
Women's Affairs	Women Affairs, Labour and Social Services Health
Science and Technology	High Education Science and Technology

Parastatal organizations are not formally placed under any of the ten sub-Committees. In practice, however, because of the nature of their functions, they are supervised by the Economic and Financial sub-Committee together with public financial institutions such

as the Bank of Zambia, the Development Bank and the Lima Bank. The allocation of ministries to each of the sub-Committees is done by the President alone and not in consultation with either the Central Control or the Committee of Chairmen of sub-Committees. By making the sub-Committees 'sub-Committees of the Committee of Chairmen'¹ and not as previously, sub-Committees of the Central Committee,² the control of ministries remains in the hands of the members of the pre-1988 Central Committee who have become Chairmen and Vice-Chairmen of the sub-Committees. Consequently, the Central Committee will have less direct influence on ministries.

(ii) The Nature of sub-Committee Control.

The ultimate objective underlying the supervision of Ministries by the Party's sub-Committees is not primarily to safeguard citizens' rights and interests against maladministration or administrative partiality, favouritism or against unfair or unjustified decisions of public organs, but to coordinate the work of the Party and its Government. To some extent, the system enables the Party to monitor accurately what goes on in the Ministries. That enables the Party to appreciate the extent to which Ministries were succeeding or failing to implement Party policies.

The nature of the control exercised by a sub-Committee takes different forms, e.g. it could be through a letter from the Chairman of the sub-Committee to the Minister or Permanent Secretary or the Director of the Ministry or Department under his supervision. In most cases the Government official is summoned to appear before the Chairman, rarely before the sub-Committee as a whole. For example, the Chairman of the Economic and Finance sub-Committee can summon the Minister of Finance to explain why a general manager of a parastatal organization issued

1. UNIP: Constitution, 1988, Art. 65(1).

2. Constitution, 1978, Art. 55(1).

a public statement blaming the Government for shortage of essential commodities. Such a 'confrontation' compels the Minister to investigate the matter and report back to the Chairman.

The placing of Government Ministries under sub-Committees suppresses criticism of the Government by the Party. Party 'militants' such as DGs whose historical pre-occupation, which brought them to pre-eminence soon after Independence, was constant criticism of public officers, are now inhibited at criticising Government performance as that would be interpreted as criticising the Minister and the Chairman of the supervising sub-Committee. The arrangement to some extent has destroyed the parallel bureaucracies in the Party and the Government; and instead created a huge bureaucracy embracing the two institutions, which operates free from competition and challenge. The arrangement concentrates power in the President, who appoints the Chairmen and Vice-Chairmen, members and advisors of each sub-Committee.

Although each of the sub-Committees is assigned specific functions,¹ failure to effectively carry out those functions or abuse of those powers, can only be queried within the Party. Thus, although the supervision of Government Ministries by the Party can be considered in the context of 'public administration', in reality there is nothing 'public' about the arrangement: it is a political intrusion of the Party into the internal administration of the Government. The system, however, has not eliminated complacency among Party or Government leaders; energetic implementation of development programmes is still wanting. The recent establishment of the Party Control Commission² is indicative of the Party's admission that control through sub-Committees was ineffective.

1. UNIP:

Constitution, 1988, Art. 65(3).

2.

ibid.

Art. 66, infra, p. 228.

(iii) The Sub-Committees and Specialized Institutions.

Among the major functions of the sub-Committees are the consideration of Party policies, carried out at the sub-Committees' monthly meetings, and, the supervision of public institutions, carried out mainly by the full-time Chairmen and Vice-Chairmen of the sub-Committees and their officials. The sub-Committees do not intervene in the work of specialized institutions such as the National Assembly and its Committees or the House Chiefs or the Judiciary or the Armed Forces or private companies. The sub-Committees do not scrutinize the role of the executive, e.g. the President's conduct of foreign relations.¹ But the sub-Committees are in constant contact with the Investigator-General's, the Anti-Corruption and Prices and Incomes Commissions because of the nature of their public functions. Such contacts are in the form of co-ordination of their efforts in combating economic and social problem and not on the basis of supervisor and supervised institution. Trade unions have often resisted scrutiny by the sub-Committees mainly on the ground that their existence and role are regulated by legislation;² an argument the Anti-Corruption and the Prices and Incomes Commissions could also use since they operate under their own respective legislation. In practice the Economic and Finance sub-Committee influences the labour movement through the Ministry of Labour and Social Services. The Ministry controls trade unions through the Commissioner of Labour, an official of the Ministry who is the Registrar of trade unions.³

Constitutional and administrative law provide a framework for the exercise of political and legal power by those in authority. A State Constitution is an instrument of national co-operation and the spirit of co-operation is as necessary as the instrument itself. In some respects the sub-Committee system works as an instrument for effecting national co-operation, for instance, co-ordination between the sub-Committees and the Prices and Incomes Commission in price fixing. In the absence of a legal

1. Infra, p. 460.

2. Zambia: Industrial Relations Act, 1971, No. 36, Cap. 508.

3. ibid. sec. 5.

basis (other than the Constitution of the Party provisions) regulating the role of sub-Committees, the sub-Committees operate on the notion that the exercise of political power should be flexible and should be free from rigorous legal controls.¹ One of the consequences of the system has been that there has been less Parliamentary control and more Party supervision of public institutions. While Parliament is accountable to the nation on its role, the Party is not. In theory, the Party represents the nation as a whole and it could be argued that supervision of public institutions by the sub-Committees is a form of accountability of public officers and governmental institutions to the public through the Party. The Party, however, unlike Parliament, cannot be questioned or criticised on its role of supervising public institutions. The Party's want of supervision of specialized public institutions arises from the nature of its supervision of public bodies which is often in general terms and not into specifics, consequently, sub-Committees cannot, for instance, supervise the work of the Courts of law or the armed forces.

Section 5. The Party Control of Parastatal Organizations.

The Background.

The origins of huge private economic organizations in NR began with the exploitation of copper deposits in 1910 though mining on a large scale started in the 1930's with the opening up by the Anglo-American Corporation (AAC) of the Copperbelt mines. The other Corporations engaged in copper mining were the Nchanga Consolidated Copper Mines (NCCM) and the Roan Consolidated Mines (RCM). Public economic bodies formed by the Colonial Government appeared later; the Maize Control Board in 1936² and the Cattle Control Board in 1937. At Independence (October, 1964), Zambia inherited about fifty public organizations, the majority formed

1. See, for example, M.M. Chona, Appendix 'A', Answer to Question No. 10, infra, p. 549.

2. NR: Maize Control Board Ordinance, 1935, No. 20, Board members appointed by the Governor; sec. 3.

during the period (1953 to 1963) of the Federation of Rhodesia and Nyasaland. Four major types of economic enterprise have existed in Zambia namely (a) foreign enterprise, the multi-nationals, e.g. Dunlop Zambia Limited (23% interest held by the State), (b) expatriate enterprise, e.g. Eagle Travel Limited (51% held by the State), (c) Zambian enterprise, e.g. Chimanga Changa milling, wholly Zambian owned, and (d) State enterprise, e.g. ZIMCO and INDECO wholly owned by the State. Although State Corporations are wholly owned by the State, e.g. the State Finance and Development, the National Import and Export and National Transport Corporations, their subsidiary companies are owned by the State and private companies.¹

(i) The Party Policy on Parastatal Organizations.

Parastatal bodies and private companies are creatures of the law, with structures, powers and responsibilities ordained by law. The Party has no similar status or powers. The business of the Party is to carry out its political manifestos adopted before and after Independence. UNIP, however, has lacked a clear policy on the role of or its relationship with, the parastatal bodies. Under the philosophy of Humanism, parastatal bodies are regarded as 'interim structures'² to carry out certain earmarked schemes of economic and social development and that their role will eventually be handed over to 'District Government'.³ Consequently, the Party's interest in parastatals has been weak. The NCEOPPDZ anticipated that under the One-Party system, the Party should not interfere with the work of parastatals, accordingly, it recommended that Chairmen of these bodies should be appointed by Cabinet, Vice-Chairmen elected by Board members and administrative heads appointed by a parastatal bodies commission.⁴ The Party was excluded from the

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1. e.g. the Zambia National Energy Corporation's subsidiaries are owned as follows: Agip Ltd. and Indeni Ltd., 50% by the State and 50% by Italian companies, Shell and BP Ltd. 51% Zambia and 49% UK, Tazama Pipelines Ltd., 66% Zambia and 34% Tanzania and Zambia Electricity Supply Ltd., 100% Zambia.
 2. Zambia: Humanism in Zambia and a Guide to Its Implementation, Part II, 1972; p. 66.
 3. ibid. p. 66.
 4. NCEOPPDZ, Report, 1972; p. 36, par. 123.

management of parastatal organizations. These recommendations were accepted by the Government¹ and accordingly, in 1976 the Parastatal Bodies Commission was established² but abolished three years later;³ accused of nepotism, corruption and inefficiency among its administrative officers and by that time it was said that "the name Parastatal is now virtually a derogatory term".⁴

The Party's basic economic policy is that economic development should be through economic planning because "an unplanned economy only ends up benefitting the few with capital and liquidity at the expense of the majority. It was with background in mind that the Party and its Government seriously embarked on rationalisation of economic planning as soon as independence was won on 24th October, 1964".⁵ President Kaunda's major economic policy statement was made to the Party's National Council on 19th April, 1968: the policy advocated Government control of the economy. Between 1968 and 1970 the Government acquired 51 per cent of shares in twenty-six major companies including the ACC and NCCM. Between 1970 and 1980 the Government formed or merged existing parastatal bodies such as INDECO and ZIMCO to manage its shareholdings in the copper-mining and other corporations and companies. Through further acquisition of shares and re-organization, major mining and industrial and commercial concerns are either wholly owned by the State or the Government is the majority shareholder. Parastatal organizations 'own' such companies or corporations are wholly owned by the State. That enables the President to chair board meetings or appoint directors and chief executives of some of these parastatal organizations such as ZIMCO and INDECO.

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1. Zambia: NCEOPPDZ-SRAG, 1972, p. 17.
 2. Parastatal Bodies Service Commission Act, 1976, No. 18
 3. Parastatal Bodies Service Commission (Repeal) Act, 1979, No. 14.
 4. The 'Watershed' Speech, 30th June-3rd July, 1975; p. 19: emphasis supplied.
 5. UNIP: A Review of the Implementation of the National Policies for the Decade 1974-1984; 1984, p. 54.

The President of the State is also the President of the Party and his involvement in the management of parastatal bodies could correctly be attributed to the Party. He has himself at times attributed his involvement in parastatals affairs to Party policies. For instance, in the appointment of the General Managers of parastatal organizations such as the United Bus Company of Zambia (UBZ).

(ii) Presidential Authority over Public Bodies.

In Mwanza v. National Transport Corporation¹ the plaintiff contended that he was appointed by President Kaunda through a letter dated 30th April, 1974, as the General Manager of UBZ, 'with immediate effect'. However, on 25th June, 1975, the plaintiff received a letter from the Managing Director of the defendant corporation, the holding company of UBZ, stating, inter alia, that "I wish to advise you that, with immediate effect, you have been relieved of your appointment as General Manager of UBZ". The plaintiff contended that being a Presidential appointee, his appointment could only be terminated by the President.

The High Court did not make a ruling on the legal effect of the Presidential appointment of the plaintiff on the ground that counsel for both parties had agreed that the appointment was made by the defendant corporation and that the President's letter was a mere nomination. On the dismissal itself, the Court held that the Articles of UBZ's Memorandum of Association vested the powers of appointment and dismissal of the chief executive of UBZ, in the Board of Directors of UBZ and/or the defendant corporation. Accordingly, the dismissal of the plaintiff was in order and valid. It was obvious at the time that the plaintiff's dismissal was as a result of opposition to 'political appointees' in parastatal organizations. The dominant role of the President has been strengthened since Mwanza's case in 1975² which was only two years after the introduction of the

1. (1979) ZR 129

2. That is, when the dismissal took place, though the case was heard in 1979.

One-Party system. During the past ten years or so Articles of Memorandum of Association of state-owned public bodies as well as statutory provisions of those boards constituted by statute, have been, were necessary, amended to empower the President to appoint the chief executives of the bodies. Thus, the President as an individual has control of public bodies either through chairmanship of the board of directors, or, through his appointees. But the Party's control of public bodies through the sub-Committees, is nominal.

(iii) Party Control of Parastatal Organizations.

UNIP at independence had not effectively asserted itself in the ¹Zambian economic sector. Although UNIP became Government, before independence UNIP leaders had no meaningful contact with the Colonial bureaucracy, the legislature, the judiciary and major industrial and commercial undertakings such as the copper mining corporations. The Party's leaders, whose administrative and business experience was restricted to running the 'party headquarters', did not possess experience or knowledge to enable them formulate a policy on the relationship between the Party and public bodies. Consequently, the 'supremacy' of the Party ushered by Arts. 4 and 47C(2) of the Constitution of Zambia in 1973 and 1975, respectively, merely placed the Party as a super-structure over the inherited economic and social structures which the Party leadership has neither the power nor knowledge (yet) to control them. The supremacy of the Party has been restricted to political affairs.

During the past ten years the Party has acquired a number of private businesses dealing with motor vehicle and agricultural equipment distribution, publishing and quarries. But these are not 'public bodies' but private Party companies, and together with public bodies, are not represented in Party organs. The appointment of ZIMCO Director-General (Evans Willima) and the ZCCM chairman and the chief

1. For further reference see: Stefanski, B., "Public Sector in Africa: The Case Study of Zambian Parastatals"; African Bulletin, Warsaw University, 1987, No. 34, p. 35.

executive (Francis Kaunda, no relation of the President) and Zambia State Insurance Corporation managing director (Mweene Mwiinga) as MCCs, is prima facie, on a representative basis. There is, however, no provision (in the Constitution of the Party) requiring that parastatals should be represented in the Central Committee or any organ of the Party. Their presence in the Central Committee is, therefore, an administrative arrangement by the President. The Party will, to some extent, influence parastatal bodies through these chief executives and vice versa.

The Party's strategy is to assert its influence throughout all leading institutions, including parastatal organizations.¹ The Party Control Commission set up after the 10th Party Congress in August, 1988 (the former Prime Minister and a present MCC, Elijah Mudenda was appointed its first Chairman) was the result of ten years of UNIP's study of Eastern European Control Commissions, particularly those of Bulgaria, Czechoslovakia and Hungary. The Party Control Commission consists of eleven members,² under a Chairman appointed by the President from among MCCs.³ While the tenure of office of the Chairman is not stated, that of the members is five years.⁴ The Party Control Commission will monitor and ensure that Party, Government and parastatal bodies understand and actively implement Party policies, decisions, plans, directives and programmes.⁵ The Commission can require any person in charge of a Party, Government or parastatal organ, to appear before it and to discuss with him his personal shortcomings or his organization's poor performance. The Control Commission is, however, not an investigating body with disciplinary powers; it is much of an inspectorate with an

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| 1. UNIP: | Constitution, 1988, Art. 7. |
| 2. | <u>ibid.</u> Art. 66. |
| 3. | <u>ibid.</u> Art. 67(1) (a). |
| 4. | <u>ibid.</u> Art. 67(1) (b). |
| 5. | <u>ibid.</u> Art. 70(1) (a). |

advisory role. Its periodic reports together with any recommendations are submitted to the Party's Committee of Chairmen, the National Council and the Party Congress.¹ There is an obvious duplication of functions between the Control Commission and the sub-Committees discussed in the previous Section. On the other hand, the Control Commission will monitor the work of sub-Committees, and on the face of it, even summon a sub-Committee chairman, as a person in charge of a Party organ, whose performance or his sub-committee's work, is below expectation, to appear before it to explain his or his sub-committee's problems.

In the absence of disciplinary powers, the Commission's role or effectiveness is limited particularly when it comes to any control of parastatal bodies and their personnel. One of the effects of the decision in Mwanza v. National Transport Corporation,² was that it highlighted the fact that public institutions operate in accordance with and within the limits of their statutory powers. The Party cannot, therefore, effectively control parastatal bodies. The provision that the Party Control Commission might use the services of any person, institution, organ or enterprise to assist it in carrying its functions,³ might enable the Commission to assert its authority. However, it will still depend on the same institution whose poor performance it would be criticising, to implement its decisions. It remains, however, to be seen how the Party Control Commission will revolutionize the Party's control of public institutions, including parastatal organizations. Otherwise its composition and functions are not different from those of sub-Committees of the Central Committee,⁴ which have had little success.

1. UNIP: Constitution, 1988, Art. 77.

2. (1979) ZR 129, supra. p. 226.

3. UNI: Constitution, loc. cit., Art. 70(2).

4. Constitution, loc. cit., now known as the Sub-Committees of the Committee of Chairmen: Art. 65(3).

CONCLUSION.

The One-Party system established in Zambia in 1973, was super-imposed on a legal regime that did not and still do not precisely afford a political party exact legal capacity or role. The deployment and role of UNIP's top functionaries in public administration both during the multi-party and the single-party systems, was to some extent, as a consequence of the Party's lack of clear legal status. In the absence of such a status, the Party could not directly control Government and other public institutions. Hence, the Party's strategy has been based on the notion that there should be direct Party's presence in leading public institutions; the more the Party participates in the decision-making of leading public institutions, the more it could consolidate its central role from which to influence the affairs of the State as a whole.

The mode of the appointment and the role of Party functionaries in public administration, tend to show that the central role of the Party is played by the President of the Party. The enlargement of the Central Committee of the Party at the Tenth Party Congress in August, 1988,¹ confirms the dominant role of the President and the fact that the Party Congress merely endorses his schemes. The enlargement of the Central Committee, the removal of the supervision of the sub-Committees by the Central Committee and their placement under the Committee of Chairmen² and the reduction of the meetings of the Central Committee from twelve to two in a year,³ reduce the Central Committee into a convocation of sectional representatives. UNIP as a 'political party' is consequently withering away: its national organs are becoming co-extensive with the nation.⁴ Paradoxically, though the Party leadership might defend or justify the enlargement of the Central Committee from twentyfive to sixtyeight members on the ground that it brings to the

1. UNIP: Constitution, 1988, Art. 58(1); supra, p. 140.
 2. ibid. Art. 65(3) supra, p. 221.
 3. ibid. Art. 58(2); supra, p. 171.
 4. infra, p. 239.

Central Committee representativeness of all sections, it also justifies the demand that the Central Committee should be democratically elected. It is rather difficult to justify or defend the fairness in the composition of a national body of sixtyeight members all selected by the President. Let the people participate in the election of the MCCs.

The Tenth National Council meeting held in June, 1977, resolved, among other things, that the Secretary-General and the Prime Minister should "evaluate and determine the causal factors underlying the failure of some Party and Government personnel and institutions to implement Party policies and programmes and to come up with recommendations as to what remedial action should be taken in the matter".¹ The two high offices have so far not come up with any recommendations as directed. One of the causes of the failure to implement Party policies or Government projects has been the sub-Committees' inability to instil a sense of responsibility in those in the leadership of the Party and Government. The tendency has been that leaders assume that Party and Government institutions 'take notice' of Party resolutions without themselves actually getting involved in seeing that resolutions are implemented and Government projects are began and finished. There had been no body charged with the responsibility of seeing that Party and Government leaders perform their functions. The Party Control Commission is now charged with that responsibility. The Commission's efforts will be hindered by legal impediments, for instance, Cabinet operates under the Constitution of Zambia in its role as the policy-implementing body of the Government and parastatal bodies operate under the Companies Act² or special legislation under which they are incorporated. In practice, therefore, notwithstanding political pressure, these institutions will remain unresponsive to any Party's attempts to bring them under the Commission's control. There is no need for control of

1. UNIP: National Council, June, 1977, Resolution 5(b).

2. Zambia: Cap. 686.

Government and parastatal organizations by the Party. The Commission's first task should be to instill a sense of responsibility and the elimination of casual attitudes among public office-holders towards their official duties.

The period of the One-Party system - 1973-1989 - has been short for any (immemorial) conventions of the Constitution to evolve vis-a-vis the relationship between the Party and the Government or around the Constitution of Zambia. In dividing institutions such as the Central Committee and its sub-Committees, UNIP acted on the basis of imperfect knowledge on how the system was going to work in practice. But the Party expected the system to operate well otherwise it would not have been introduced in the first place. The past fifteen years afforded the Central Committee some experiences with which to assess what was possible and how 'things work' in the Party and in the Government. Ideally the old Central Committee and the Sub-Committee system should have been allowed to consolidate and perfect their roles as well as those of the Government institutions whose efforts they coordinated. The enlargement of the Central Committee and the creation of the Party Control Commission, however, reveal one of UNIP's weaknesses: duplication of Party organs and State bodies consisting of the same personnel and performing similar functions, e.g. the Central Committee, the Committee of Chairmen, the Cabinet, the Party Control Commission and the sub-Committees. Given time, coordination (between the sub-Committees and Government Ministries) rather than inspection (of Government and parastatal institutions) by the Party Control Commission, was going to prove an effective method of cordial relationship between and among Party, Government and public institutions such as local authorities and parastatal organizations. Inspection by the Party Control Commission is bound to be resented by public officers who are likely to view it as an attempt by the Party to convert public institutions into wings of the Party. That is likely to create unnecessary conflicts between and among otherwise complementary institutions.

CHAPTER VI.ADMINISTRATIVE LAW IN A ONE-PARTY STATE.Judicial Review and Administrative Controls
of Party Activities.Introduction.

The dominant features of colonial administration in NR were, inter alia, centralism and authoritarianism. Most decisions of colonial administrators were not open to question. For instance, in Re Mailo¹ the court refused to grant an order of certiorari against District Commissioners on the ground that they were only performing a ministerial function and not exercising a judicial or quasi-judicial function. The brief facts were that there was a dispute between the applicant, Chief Mailo and the third respondent, Chief Mpumba, about the common boundary, which was also the boundary between two administrative districts defined by the Governor under Art. 13 of the Northern Rhodesia Order in Council, 1924-1957. On instructions the first and second respondents, the respective District Commissioners of these districts, heard the submissions of the parties, forwarded them to higher authority, and subsequently conveyed to the parties the decision thereon. On an application, by way of certiorari, to the court to review and quash the decision, and for an order of mandamus to the District Commissioners to re-hear and determine the dispute, it was held that in hearing the submissions and conveying the Governor's decision thereon the District Commissioners were not exercising a judicial or quasi-judicial function, but were merely performing a ministerial function - consequently certiorari did not lie.

Judicial review was in the main invoked to protect settler rights while native interests were protected by a hierarchy of authorities ranging from the Chief, District and Provincial Commissioners and ending with

1. (1960) R & N LR 132.

Secretary for Native Affairs, the High Commissioner or the Governor himself. In general, Africans were reluctant to challenge colonial administrators' decisions or actions in the courts of law, on suspicion that justice might not be seen to be done in their favour as they perceived the judiciary as a wing of the colonial administration. African leaders of NRANC, ZANC and UNIP although they were often victims of some administrative decisions or actions which otherwise they should have challenged, e.g., being refused permission to hold a public meeting or a procession, hardly challenged such official decisions. Their challenge¹ was sometimes through the holding of unauthorized meetings or processions which often ended with the leaders being charged with unlawful assembly.² In the case of In re Aaron Mwenya³ the applicant for a writ of habeas corpus instituted his application in the High Court in London probably for two main reasons, first, that although he was a native of NR and therefore, a British Protected Person, he was also a registered British subject, and, secondly, he assumed that his application had a better chance of a fairer hearing in the UK than in his native country NR.

The common law of England imported into NR had not evolved a satisfactory approach to public law in the form of effective scheme of administrative law or an integrated pattern of judicial remedies for the control of administrative actions. Many factors inhibited a systematic growth of public-law remedies parallel to those which were developed by the courts for private-law suits. Among these factors was the recognition of extensive prerogative powers, the exercise of which was considered to be beyond judicial review, e.g. the actions of the Governor and the immunities of the Crown except as modified by the Crown Proceedings

1. See supra, p. 73, Kenneth Kaunda's statement in defiance of such prohibition.

2. Attorney-General v. Hagamata (1959) R & N LR 226

3. /1959/ 3 WLR 509 and /1960/ 1 QBD 241

Ordinance, 1951¹ which allowed certain actions against the Government and modified 'Crown privileges' in the law of evidence. The Courts in NR exercised their responsibility of investigating the scope of lawful authority for administrative actions, whenever it was challenged, through the prerogative orders of certiorari, prohibition and mandamus and they could grant equitable remedies of injunction or declaration.

After Independence, Zambia has continued to apply most of the administrative laws and practices established during the colonial era. The High Court Act,² provides that the jurisdiction vested in the High Court shall, as regard practice and procedure, be exercised in the manner provided by the Criminal Procedure Code or by such rules and Orders of the Court as may be made pursuant to the Act and the Code, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.³ In Kausa v. The Registrar of Societies⁴ the High Court relied on this provision, and various English authorities⁵ to suggest the right and the manner in which such right should be exercised, by the Court to grant an order of certiorari and review the decision of the Assistant Registrar. The Court quashed the decision of the Assistant Registrar on the ground that judicial functions imposed on the Registrar must be performed by him personally and cannot be carried out through subordinate officers. Presumably, the jurisdiction for such matters as mandamus and certiorari, not specifically mentioned in the statutes, derives from the provisions of the High Court Act which gives the High Court supervisory jurisdiction.⁶

In the UK there are two recognized separate fields of law: one of private law, and the other of public law. Private law regulates

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1. NR: 1951, No. 14, which introduced into NR law some of the provisions of UK's Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44, sec. 6.
 2. 1961, No. 43, Cap. 3.
 3. ibid. sec. 10.
 4. (1977) ZR 195.
 5. Rex v. Hendon R.D.C. [1933] All E.R. 20, R. Electricity Commissioner [1924] 1 KB 171, R. v. Barnstaple Justices [1938] 1 K.B. 385.
 6. Muyungo v. Induna Nalubutu (1959) R & N LR 677.

the affairs of subjects vis-à-vis public authorities. For many years there were special remedies available in public law. They were the prerogative writ of certiorari, mandamus and prohibition. They were taken in the name of the sovereign against a public authority which had failed to perform its duty to the public at large or had performed it wrongly. Any subject could complain to the sovereign and then the King's courts, at their discretion, would give him leave to issue one of the prerogative writs as was appropriate to meet his case. But these writs only gave the remedies of quashing, commanding or prohibiting. They did not enable a subject to recover damages against a public authority, nor a declaration, nor an injunction. Although through out the years some of these defects were rectified, it was not until 1976 that the Law Commission on Remedies in Administrative Law,¹ made fundamental recommendations on the reform of 'Forms of Action' in English legal system. The Commission recommended introduction of a completely new, unified procedure - an application for judicial review - through which all the existing remedies would be available.

Consequently, a new Order 53, Rules of the Supreme Court (1977) was introduced which provides for prerogative orders, declaration and injunction to be available through an 'application for judicial review' in the Queen's Bench Division: there is a two-stage process; first an application is made, ex parte, for leave to apply, and, second, the application itself after leave is granted. The new arrangements were confirmed later by the Supreme Court Act, 1981,² sec. 31.

The High Court in Zambia in its procedure is guided by the provisions of the High Court Act, referred to on the previous page, and

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1. UK: Report on Remedies in Administrative Law; Cmd. 1976/6407.
 2. 1981, c. 54. Rules of the Supreme Court, Ord. 53, came into force in January, 1978, see: O'Reilly and Others v. Mackman and Others /1983/ 2 AC 237

the Constitution of Zambia, 1973, which, e.g. allows a party to bring a question of fundamental rights infringement before the High Court.¹ UK legislation is not automatically applied in Zambia unless it is incorporated into Zambian law. Notwithstanding the provisions of sec. 10 of the High Court Act that the jurisdiction of the High Court shall be exercised in the manner provided by local legislation and Orders, and that in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice, Ord. 53 of the UK Rules of the Supreme Court, 1977 could apply in Zambia only in default of any specific procedure being laid down in the Constitution or any rules thereunder or under the Rules of the Supreme Court of Zambia. So far that Order has not been envoked in the High Court in Zambia.²

Definition of 'Administrative Law' and the Party.

The field of administrative law is a large one and there is no single universally accepted way of dividing it up for the purposes of an exposition. Definitions of 'administrative law' are correspondingly legion: however, 'administrative law' is the law which deals with the legal control of governmental powers and which is exercised by the courts over the use of statutory powers by administrative agencies.³ That definition should be viewed in a wider context in that supervisory jurisdiction of the High Court was adaptable and could be extended to any body which performed or operated as an integral part of a system which performed public law duties and whose role affected members of the public. Administrative law, however, is often perceived as that body of law which is concerned with public or governmental

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1. Zambia: Constitution of Zambia Act, 1973, Art. 29. See, e.g. Sinkamba v. The Chief Justice (1974) ZR 1, being an application for mandamus directed at the Chief Justice to appoint a tribunal under that Article.
 2. See e.g. ZNPF v. Attorney-General and Others (1983) ZR 140 and Walulya v. Attorney-General (1981) ZR 327.
 3. Hawke, N., An Introduction to Administrative Law; ESC, Oxford, 1984, p. 3.

agencies; it regulates the relationship between governmental agencies and private individuals and between governmental agencies and other public institutions.¹ These definitions contain both institutional and functional elements within administrative law. The institutional divisions tends to follow broadly the traditional tripartite division of government into the Legislature, the Executive and the Judiciary. Some studies of administrative law concentrate on functional aspects, for instance, the legal control of administrative action, especially by means of judicial review.

The definitions of administrative law cited above show that administrative law is concerned with governmental agencies which possess and exercise powers and functions delegated to them by legislation. A political party such as UNIP is not a governmental agency in form or substance and does not belong to the category of 'public authorities': its legal status is that of an unincorporated members' association at common law and its business is the mobilization of people for political ends. Its leaders and workers are not strictly speaking, 'public officers'. It would appear, therefore, inappropriate to include and consider the role of UNIP in Zambia in the context of administrative law. However, under the One-Party system currently operating in Zambia, Party leaders and officials are sometimes included among 'public officers' e.g. under the Leadership Code,² the Commission for Investigations,³ and the anti-corruption legislation.⁴ Moreover UNIP enjoys a monopoly of power as the only authoritative source of Governmental power and Party leaders and Party organs are assigned vital functions under the Constitution of

1. Cane, P., An Introduction to Administrative Law; Clarendon Press, Oxford, 1986, p. 4.

2. Zambia; Leadership Code, S.I. 1976/88, Reg. 2.

3. Constitution of Zambia Act, 1973, Art. 117(4) (b).

4. Corrupt Practices Act, 1980, No. 14, sec. 3.

Zambia which brings their role within the ambit of public administration.

The management of 'societies' in Zambia falls under the Registrar of Societies,¹ a public officer who is empowered to perform administrative, judicial and quasi-judicial functions which include the registration or the exemption from registration of societies. He can rescind exemption of any society as well as cancel registration of any society,² including UNIP's branches or the headquarters. In performing his functions, the decisions of the Registrar of Societies are sometimes made in conjunction with some consultation with the Permanent Secretary or the Minister of Home Affairs. As regards registration or cancellation of registration of a society, the Registrar merely briefs the Minister because that is a function - a judicial function - imposed on the Registrar by the Act and must be performed by him personally while purely administrative functions can be carried out through subordinate officers.³

The Registrar of Societies may, in his discretion, cancel at any time the registration of any society effected under the Act on several grounds, for instance, that the terms of the constitution or rules of such a society are, in his opinion in any respect repugnant to or inconsistent with the provisions of any law for the time being in force in Zambia,⁴ or that the society has changed its name and the new name it has adopted is, in his opinion, repugnant to or inconsistent with the provisions of any law in force in Zambia or is otherwise undesirable.⁵

The Registrar of Societies registers annually all UNIP branches and the headquarters. Since Independence there has been no case of a UNIP branch being proscribed by the Registrar of Societies. The Registrar of Societies in consultation with the Minister (of Home Affairs) can, as a matter of law, proscribe any branch of UNIP or UNIP as a whole.

1. Zambia: Societies Act, Cap. 105, sec. 3(1).

2. ibid. sec. 12(1).

3. McConville v. Commissioner of Taxes (1973) ZR 195.

4. Societies Act, loc. cit., sec. 13(2) (a).

5. ibid. sec. 13(2) (e) (iii).

Section 1. Judicial Review of Administrative Action.

A Constitution imposes some limitations on the use of governmental powers in its attempt to ensure a 'government of laws and not of man'. The essence of constitutionalism lies in a certain diffusion of powers at least into the traditional divisions of the executive, the legislature and the judiciary. Under a One-Party system the executive, the legislature and the Party, are closely tied together.

Because the machinery of judicial review is closely associated with a written Constitution, it is sometimes assumed to have originated in the USA through the exercise of such powers by the Supreme Court. The origins of judicial review, however, can be traced to the earliest period of English legal history; the idea of a 'fundamental' or 'higher' law was identified with the common law. Sir Edward Coke, the renowned Lord Chief Justice of the Common Pleas in England, once declared that "it appears in our books that in many cases of common law will control acts of Parliament; and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right and reason, and repugnant, or impossible to be performed, the common law will control it and adjudge such acts to be void."¹ This declaration has been a subject of debate and criticism particularly by the modern advocates of the doctrine of parliamentary sovereignty.² Coke's observation, however, revealed that the question whether one governmental institution should or should not exercise control over another governmental institution, exercised the minds of the English judiciary many years before the emergence of the USA Supreme Court.

1. The Case of Bonham (1610) Coke's Rep. 107 at p. 118.

2. See for example, Plucknett, T.F.T., "Doctor Bonham's Case and Judicial Review", 40 Harvard Law Review, 30; Jennings, I., "Was Lord Coke a Heretic?" in his The Law and the Constitution; Hodder and Stoughton, Cambridge, Fifth ed. 1976, Appendix III, p. 318.

Judicial review has played a prominent role under the written Constitution of the USA: a prominence highlighted by the judgement of Chief Justice Marshall in Marbury v. Madison,¹ in which he said, among other things, that

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by the court, as one of the fundamental principle in our society.

The American notion of judicial review, however, was rooted in the English legal tradition, based on the common law which assigned to the rulers (Parliament) their powers, to each of the Courts of the realm its proper jurisdiction, and, to the English people their rights and privileges. At Independence (24th October, 1964) Zambia inherited the English methods of controlling the administration through Court orders of certiorari, mandamus and prohibition and the equitable remedies of injunction and declaration. The Independence Constitution and the One-Party Constitution of 1973 contained and contains, respectively, provisions on the role of the executive, the legislature and the judiciary. The provisions on the protection of fundamental rights and freedoms of the individual (the Bill of Rights) provide that any person who felt that his fundamental rights and freedoms as granted and protected by the Constitution had been, or were being or were likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which was lawfully available, may apply to the High Court for redress; and the High Court may make such orders, issue such writs and give such directions as it may consider necessary for the purpose of enforcing the rights and freedoms guaranteed by the Constitution.²

1. 1 Cranch, 137, 2 L.Ed. 60 (1803).

2. Zambia: Constitution of Zambia Act, 1973, Art. 29, supra pp. 127-129.

With the exception of damages,¹ the Constitution does not name the nature of the redress that the High Court might give, consequently, the remedies are those under common law and equity.

The Constitutional provisions guaranteeing and protecting the rights of the individual, although aimed at the application of executive powers, apply also to other institutions which have powers that might be used to deprive any person his rights and freedoms under the law. That would include UNIP, for instance, a person who alleges that his opportunity to exercise his right to stand for election for an office in the Party, was unlawfully hindered, could seek some redress from the court. That, however, is not without some difficulty because, on one hand, the courts do not afford UNIP legal capacity to sue or be sued in its name,² while, on the other hand, the courts would intervene in matters pertaining to the internal affairs of the Party.³ This matter will be considered in the context of State immunity and the Party and the equitable remedies, in particular that of declaration.

(a) State Immunity and the Party.

Official functions on behalf of the Republic of Zambia are performed by public officers, that is, persons in the public service and these include the President, the Prime Minister, Ministers, Ministers of State, the Attorney-General, the DPP, civil servants and members of the Zambian armed forces. Among the classic English administrative law rules that can be said to transcend society and political ideology is that of state immunity, namely that action in contract or tort might not be commenced against the State or servant or agent of the State (the Crown), except as allowed by the law.⁴ In Zambia the State Proceedings Act, 1965,⁵

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1. Zambia: Constitution of Zambia Act, 1973, Art. 29(8) as amended by the Constitution of Zambia (Amendment) Act, 1974, No. 18.
 2. Nkumbula and Kapwepwe v. UNIP (1978) ZR 378.
 3. Nkumbula and Kapwepwe v. Attorney-General (1979) ZR 263
 4. UK: Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c, 44
 5. Zambia: 1965, No. 27

is modelled on the UK legislation. The State has inherited the general immunity of the British Crown from legal liability for the acts of its servants and agents. However, subject to the provisions of the Act, the State is liable in contract and tort¹ for the acts of its servants and agents in cases in which a private person of full age and capacity would have been liable and any claim arising therefrom will be enforced against the State as of right. The High Court can, in such cases, make such orders as it has power to make in proceedings between subjects, e.g., it may issue an injunction or order specific performance or make a declaratory ruling or award damages.

The State Proceedings Act does not apply to UNIP. The introduction of the 'One-Party State', and the inclusion of Party organs such as the Central Committee and the Party Congress in the State Constitution, has not converted the Party or its organs into organs of the State. Accordingly, the Committee of Chairmen's adoption of candidates for election to the National Assembly, although assigned to it by the Constitution of Zambia,² was open to judicial review unlike proceedings of Cabinet which are not susceptible to the supervisory jurisdiction of the High Court. The Committee of Chairmen cannot successfully claim 'State Immunity' against any suit challenging its decision disapproving the candidature of a prospective Parliamentary candidate. In the absence of legislation ousting the courts' jurisdiction of review of decisions of the Committee in carrying out its vetting role,³ its decisions would have been subject to judicial review.

The chairmanship by the Secretary-General of the Party of the Cabinet,⁴ and the supervision of Government ministries by the Party Control Commission⁵ and sub-Committees of the Central Committee,⁶ do not convert

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1. Zambia: State Proceedings Act, op. cit., secs. 3 and 4.
 2. Constitution of Zambia Act, 1973, Art. 75(5).
 3. Electoral (Amendment) Act, 1983, No. 2, sec. 5, infra, p. 286.
 4. supra, p. 199.
 5. supra, p. 228.
 6. supra, p. 218; sub-Committees of the Central Committee now referred to as sub-Committees of the Committee of Chairmen; supra, p. 219.

Government institutions into Party organs, or, conversely, make the Party or any of the Party's organs organs of the State. UNIP remains an unincorporated members' association at common law: a political party. The Party's Central Committee and Committee of Chairmen are so closely integrated into the general administration of Zambia that the courts of law might in future hold that these organs of the Party are State organs. The Party would possibly be opposed to such a development as it would run counter to its wish to maintain the Party as the 'supreme organization' in the land. Political leaders would also object to their role and status being equated with those of public servants. Such a development would be welcomed by some members of the public as it would make the State and not the Party, accountable for the acts of Party functionaries whether in contract, tort or otherwise. It would go far towards safeguarding the interests of the members of the public who at the moment cannot take action against the Party because of its illusive status as a members' association except in a representative capacity.

(b) Review of Governmental Activities.

Judicial review of Governmental activities can be in the form of review of the legislation or of the functions of Ministers and their subordinate officers. Under Zambia's One-Party system, where legislation is passed without 'opposition', the judiciary has an added responsibility, as one of the sentinels of public interests, to ensure that legislation passed by a One-Party Parliament or its implementation by the administration does not run counter to the letter and spirit of the Constitution, which is the supreme law of the land though it can be amended by Parliament.

(i) Judicial Review of Legislation.

Judicial review of legislation is a matter between the Courts and the Government and does not affect the role of UNIP. However, in the context of the Party's claim that the National Assembly is a wing of the Party charged with the responsibility of converting Party policies into the laws of the country, it could be argued that judicial review

of the legislative function of Parliament is a form of review of Party policy or its implementation. One of the areas of the Zambian society where the Party has been unsuccessful in getting a positive response from those in the leadership of the Party, the Government and the parastatal organizations, has been in the control of official abuse of office. Corrupt practices in public office have been on the increase since the introduction of the One-Party system. In an effort to control corruption, the Corrupt Practices Act, 1980¹ was passed, implementing the Party's policy that bribery, nepotism and corruption should be eliminated from public office. The Act provides, vis-a-vis the mode of trial of a person charged with the offence of corruption, that

An accused person charged with an offence under Part IV shall not, in his defence be allowed to make an unsworn statement but may give evidence on oath or affirmation from the witness box.²

That section does not compel an accused person to give evidence; his right to remain silent is maintained, all that it requires is that if he elects to say something, he has to do so on oath. On the other hand, the Constitution of Zambia provides as follows, that

No person who is tried for a criminal offence shall be compelled to give evidence at the trial.³

In corruption cases refusal by the accused to give evidence might be construed as a sign of guilt and there is, therefore, some pressure on the accused to defend himself. The consequences of the provisions of the Corrupt Practices Act, were indirectly to compel an accused person to give evidence and to give that evidence on oath. To that extent, the provisions of the Act purported to amend the provisions of the Constitution. The provisions of the Act would not be null and void if it could be shown that the Act was intended to amend the Constitution and had in fact done so. That could be shown by a

1. Zambia: 1980, No. 14.

2. ibid. sec. 53(1).

3. Constitution of Zambia Act, 1973, Art. 20(7).

certificate signed by the Speaker that the Act was passed in the manner provided for by the Constitution in its amendment. In Mumba v. The People¹ an attempt was made to compel the accused public officer charged with corrupt practices to give evidence on oath in accordance with the provisions of the Act. The High Court held that the Corrupt Practices Act did not amend the provisions of the Constitution, that there can be no implied amendment of the Constitution, that an accused person charged under the Act cannot be compelled to give evidence if he elected to make an unsworn statement, and, consequently sec. 53(1) of the Act was ultra vires Art. 20(7) of the Constitution and to that extent null and void.

The Party's commitment to change the law to conform with the goals of the 'revolution' is influenced by the notion that the Party should unshackle the Zambian society from foreign laws and institutions. The value in doing that would be that the running of the Party, its Government and the society would be based on home-grown norms of conduct which were not only pertinent to the Zambian way of life but which were ingrained in the Zambian traditions and customary rules.² There is no doubt that the Zambian society abhors corruption of any form. There is also no doubt that the majority of Zambians support the Party's effort to eradicate corrupt practices in public office. But most people would, notwithstanding their support for stringent laws combating corruption, endorse the principle that a person charged with corrupt practices should be presumed innocent until proved guilty and should, therefore, be fairly tried.

The decision in Mumba's Case showed that the role of the Party as the policy-maker, Parliament as the law-maker and the judiciary as the law-interpreter, resemble those which exist in the English system of

1. (1984) ZR 38

2. UNIP:

See, for example, President Kaunda's observation, The 'Watershed' Speech, 30th June-3rd July, 1975; pp. 16 - 20.

government. Although the provisions of sec. 53(1) of the Corrupt Practices Act might have precisely stated the Party's policy of less lenience and more severity in dealing with public officers accused of corruption, UNIP could not intervene in the matter. The Court had to decide whether the procedure laid down by the Constitution of Zambia with regard to making amendments to that Constitution had or had not been followed,¹ or whether there was the Speaker's certificate showing that those procedures had been followed,² or whether there was a conflict between the provisions of the Constitution and the Act, and what the legal consequences were of the presence or absence of any of these requirements. The Party obviously plays no role in the judicial review of legislation.

(ii) Judicial Review of Presidential Authority.

The establishment of the One-Party system in Zambia has witnessed a steady increase in the number of cases requiring judicial review of executive authority. That has been as a result of more Zambians engaging in economic³ or political ventures which have brought them into conflict with authority and the Party and its Government becoming more sensitive to public criticism than was the case during the multi-party system. During the multi-party system opposition MPs and members of opposition parties could criticise UNIP and the Government in or outside Parliament and could not be detained for that. Under the One-Party system opponents of the Party have at times been placed under detention orders.⁴ Most African Presidents inherited extensive undiluted detention powers formerly vested in and used by the colonial Governors and colonial

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1. Zambia: Constitution of Zambia Act, 1973, Art. 80.
 2. Acts of Parliament Act, 1964, No. 64, Cap. 16, sec. 9(c).
 3. In Bagaratilal Rao v. Attorney-General (1987) SCZ, the Supreme Court upheld a detention order for 'economic sabotage': Times of Zambia, 20th November, 1987.
 4. See e.g. Kapwepwe and Kaenga, In re (1972) ZR 248 and Chisata and Lombe v. Attorney-General (1981) ZR 35; both cases concerned the detention of former leaders of the proscribed UPP.

administrators, which were in the majority of cases used arbitrarily. At Independence, however, the Instrument of Independence was ceremonially handed over to the leader of the majority party forming the Government, on behalf of the people. In the case of Zambia, the President of the State is also the President of the Party. Judicial review of executive authority is, prima facie, a review of the role of the President in State matters, that is the review is restricted to the President's role as Head of State and Government under the Constitution of Zambia. So far there has been no case before the courts involving the President in his capacity as the leader of UNIP. All cases of judicial review of executive authority are conducted as matters pertaining to the Constitution of Zambia and the President is accordingly represented by the Attorney-General. One could speculate that the President, in detaining a political opponent of the Party, subjectively acts as the leader of UNIP and his primary concern in such a case is the preservation of the Party first and the State second.

The law, however, merely provides that whenever the President is satisfied that for the preservation of public security it is necessary to exercise control over any person, he may make an order directing that such a person should be arrested and detained whether inside or outside Zambia.¹ The determination as to whether a detention is reasonably justifiable is a privilege of the detaining authority.² It is difficult to know if the President consults the Secretary-General of the Party or members of the Committee of Chairmen or any body before he detains political opponents of the Party, because those are matters stricted to those in authority. There have been cases, however, where the President has detained persons following a public demand by the Party (expressed on placards and

1. Zambia: Reg. 33, Preservation of Public Security Regulations, Cap. 109.

2. In the Matter of Nkaka Chisanga Puta (1982) ZR 80 per Sakala, J., at p. 108.

slogans at public rallies) that certain named opponents of the Party should be detained.¹ Judicial review of such cases has been confined to the executive authority of the President as President of Zambia and not as President of the Party. The fact that the detention was as a result of the Party publicly demanding that its President detain the opponents of the Party in question, has not resulted in such cases being treated as Party matters. Such detentions are State matters because the detentions are carried out under the powers vested in the President by the laws of Zambia and not the Constitution of UNIP.

That situation should be maintained because it enables a detained person to seek redress through judicial review under the laws of the country. Otherwise, if the detentions were regarded as matters pertaining to the role of the Party, problems of the legal capacity of the Party would arise and most likely the injured person would fail to seek any remedy against the Party or its leaders. Although at the moment most detainees fail to obtain their release from detention or damages for wrongful detention, at least the procedure to challenge executive authority exists. The failures are caused by the limited grounds upon which a detention order can be challenged: first that of mistaken identity of the detained person and, second, that the grounds supplied for detention were vague.² But these are matters between the detaining authority (the President) and the detainee and the Party hardly features in the conflict. Although between 1983 and 1988 the number of detentions for economic 'sabotage' has been on the increase, political detentions have continued to be used as means of political control of opponents of the Party and the Government.

1. See for instance, Chipimo v. Chona, Secretary-General of UNIP and Attorney-General (1983) ZR 125.

2. Zambia; Constitution of Zambia Act, 1973, Art. 27(1)(a).

(ii) Judicial Review of Ministerial Actions.

The phrase 'ministerial actions' refers to the official acts of Ministers, Ministers of State and civil servants but excludes official actions of the President and Party functionaries engaged in public administration, such as Provincial MCCs, PPS and DGs. The role of the Courts in reviewing ministerial actions or decisions is merely that of ensuring that public officers act in accordance with the law or ministerial codes of conduct, where these exist. 'Maladministration' includes bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness;¹ matters which could possibly be proved in judicial review. 'Maladministration', however, also covers matters that cannot be reached in judicial review such as official discourtesy. Notwithstanding the twofold phrase of 'the Party and its Government', judicial review of ministerial decisions or actions is a review of the Government and not of the Party administration. The role of UNIP in ministerial actions is confined to the relationship between Ministries and sub-Committees. In some cases the Party can spring to the defence of an individual against ministerial action, e.g. in re Chirwa (Edward Yapwantha)² the applicant for declaration that he had a right to remain in Zambia, had entered Zambia as part of UNIP's policy of giving shelter to political refugees fleeing from Malawi. He was granted refugee status under the Refugee (Control) Act, 1970.³ The Minister responsible for immigration and refugees declared the applicant's presence in Zambia to be inimical to the public interest, declared him a prohibited immigrant and accordingly served him with a deportation order under the Immigration and Deportation Act, 1965.⁴

1. UK: The Parliamentary Commissioner Act, 1967, sec. 5(1) (a) did not define 'maladministration'; that is left to the Courts: Local Commissioner, Ex Parte Eastleigh Borough Council /1988/ 3 WLR 113.

2. (1974) ZR 14; infra, p. 471.

3. Zambia: 1970, No. 40, Cap. 112, sec. 10.

4. 1965, No. 29, Cap. 122, secs. 22(2) and 26.

The Minister's action was contrary to both the Party policy on political refugees and provisions of the Refugee (Control) Act but it was in accordance with his powers under the Immigration and Deportation Act; he could deport from Zambia any person who, in his opinion, presented a threat to peace, law and order in the country. The Court ruled that the Minister could not deport a person who had entered Zambia and remained therein under the Refugee (Control) Act. That was probably a decision which cheered the Party as it was in line with its declared policy.

There is no evidence to suggest that, in carrying out its task of the review of ministerial functions, a court is subjected to Party pressures to reach a particular decision. The court works on the assumption that Parliament acts constitutionally and that the laws it passes are necessary and reasonable. Consequently, the court presumes that actions of Ministers etc., are lawful; where such actions are queried, the role of the court in judicial review is to uphold legality and ensure that the rule of law, and not the rule of man, prevails. Judicial review of ministerial actions is, therefore, a matter which does not directly apply to the role of UNIP. The Party is, however, one way or the other, sometimes interested in the outcome of a judicial review of ministerial actions.¹ So far there has been no case in which a Minister has objected to judicial review of his action on the ground that he was carrying out Party policy and that the review would be contrary to Party policy.²

(c) Judicial Review of Activities of the Party.

Judicial review of administrative acts can be carried out in many different forms, for instance, in the form of hearing of applications for review of a decision of an administrative authority, or an appeal from such a decision or where a court prevents an administrative authority from exceeding its statutory powers. There are two contrasting views on

1. Infra, p. 475.

2. In Shipanga v. Attorney-General (1977) ZR 53, the Attorney-General who objected to carrying out certain Court instructions, was not defending his own action: infra, p. 479.

the source of power of public bodies whose activities are subject to judicial review: the sole test whether the body of persons is subject to judicial review is the source of its power and that that source has been through legislation including subordinate legislation, or the prerogative. In support of this view, it has been observed as follows:-

For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive power..... The ultimate source of the decision-making power is nearly always a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of common law that is given by lawyers the label 'the prerogative'. Where this is the source of decision-making, the power is confined to executive officers of central as distinct from local government and in constitutional practice is generally exercised by those holding ministerial rank.¹

The other contrasting view has been expressed as follows:-

I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review.

But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may..... be sufficient to bring the body within the reach of judicial review.²

The essential distinction between decisions that do or do not produce 'public law consequences' which runs through cases decided

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1. Council of Civil Service Union v. Minister for the Civil Service
/1985/ A.C. 374, per Lord Diplock at p. 409; the brackets provided in the observation.
 2. R. v. Panel On Take-Overs and Mergers, Ex parte Datafin Plc and Others
/1986/ 1 QB 815, per Lloyd, L.J., at p. 847

by the courts, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. In the Ex parte Datafin Plc case, the Panel on Take-Overs is an unincorporated association without legal personality whose members are appointed by and represent the Accepting Houses Committee, representing financial institutions in the City of London. It has no statutory, prerogative or common law powers and it is not in contractual relationship with the financial institutions or those who deal in the financial market. Its role is that of enforcing the City Code on Take-overs and Mergers. The applicants applied to the High Court for leave to apply for judicial review by way, inter alia, of certiorari to quash a decision of the Panel and of mandamus to compel the Panel to reconsider their complaint. The judge refused leave on the ground that the panel's decision was not susceptible to judicial review.

The Court of Appeal held that the supervisory jurisdiction of the High Court was adaptable and could be extended to any body which performed or operated as an integral part of a system which performed public law duties, which was supported by public law sanctions and which was under an obligation to act judicially, but whose source of power was not simply the consent of those over whom it exercised that power; that although the panel purported to be part of a system of self-regulation and to derive its power solely from the consent of those whom its decisions affected, it was in fact operating as an integral part of a governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties and was under a duty in exercising what amounted to public powers to act judicially and, that the Panel's role was subject to judicial review.

In Zambia UNIP operates as a non-statutory self-regulating body engaged in the political business of the Republic. In one case, that

1. Infra, p. 315.

of Nkumbula and Kapwepwe v. Attorney-General¹ notwithstanding the earlier decisions that the Party could not sue or be sued in its name² and that the Secretary-General of the Party could not be cited in his official capacity in litigation,³ the Court entertained an application for a judicial review of the activities of UNIP at its General Conference. That decision and the decision in Panel on Taker-overs and Mergers confirm that a non-statutory self-regulatory body, e.g. UNIP, can have its decisions and activities reviewed by the Courts. Some of the consequences of such a review are considered in the following Section on remedies in judicial review.

Section 2. Judicial Review : Some Remedies.

Unlike under the UK's Order 53 which has since 1977 provided a procedure by which every type of remedy for infringement of the rights of an individual that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for a judicial review, and which remedy is found to be the most appropriate in the light of what has emerged from the hearing of the application, can be granted to him, in Zambia the applicant for judicial review has to apply for a specific remedy; granted or denied at the discretion of the Court.

(i) Damages.

Damages can be awarded to or against UNIP in contract or tort in a representative capacity.⁴ Damages are rarely awarded in judicial review cases, for instance, no court can make an order for damages against the Republic in respect of a detention or restriction order signed by the President except for physical or mental ill-treatment⁵ or an error

1. (1979) ZR 267; supra, p. 158.

2. Supra, p. 153 et seq.

3. Supra, p. 155 et seq.

4. Campbell v. Thompson /1953/ 2 WLR 565, an unincorporated body sued in a representative capacity.

5. In the Matter of Nkaka Chisanda Puta (1982) ZR 80 at p. 109; awarded K65,000 for physical and mental ill-treatment while in detention: Times of Zambia, 25th March, 1989.

in the identity of the person restricted or detained.¹ Most Commonwealth countries follow the common law principle that there is no general right to damages for loss or injury suffered by an individual as a result of an invalid administrative action.² In Zambia the position was the opposite in that Courts awarded damages to persons 'wrongfully detained',³ which in essence meant the person was invalidly or irregularly or unjustly detained. As stated earlier, the President of Zambia is also President of the Party and although his restriction or detention powers are derived from the Constitution of Zambia, the Party is partly involved in such matters. That can be shown by the Party reaction against the payment of damages to persons, mostly former UPP leaders, detained by the President at the time of the introduction of the One-Party system. The Party resolved that the payment of damages should be discontinued and directed that

to close the loophole in the law used by by ex-detainees to sue the State, the Government should take steps to have the law amended so that a person should not be able to sue the State after his release.⁴

This resolution resulted in the amendment to the Constitution of Zambia cited above.⁵ What had happened was that following the establishment of the One-Party system and the prescription of the ANC and UPP, a number of political leaders of these organizations were detained. Most of these had their detention orders declared invalid, were released and later awarded damages in actions for wrongful detention. The Party's resolution and the subsequent amendment of the Constitution have had the effect that courts can hold that the applicant was detained

1. Zambia: Constitution of Zambia Act, 1973, Art. 29(8) as amended by the Constitution (Amendment) Act, 1974, No. 18.

2. Read, J.S., "Damages in administrative law", CLB, January, 1988, p. 428.

3. Kawimbe v. Attorney-General (1974) ZR 244.

4. UNIP: National Council, April, 1974.

5. loc. cit., footnote (1) above.

unlawfully but refuse to award him damages except in those two situations of wrongful identity or ill-treatment while in detention.¹ The amendment has not stopped detainees challenging administrative actions, but it has removed one of the effective deterrents against executive 'abuse' of detention powers: substantial damages paid by the State to persons whose restriction or detention orders were found to be irregular or based on unreasonable grounds. To some extent, that has contributed to an increase in the number of detention orders being issued after 1974.

Except for the link between the President and the Party, UNIP as a Party does not possess restriction or detention powers. The Secretary-General of the Party, except when performing the functions of the President, cannot issue a restriction or detention order against any person. If he did, it would be an invalid order and the person detained or restricted under such an order would sue not the State or UNIP² or the 'Secretary-General of UNIP',³ but the Secretary-General in person or in a representative capacity.⁴ Such an action, however, would not, strictly speaking, fall within the ambit of 'administrative law' or 'judicial review', but under the general law of torts. The reason for that would be that the Secretary-General would not have used any known administrative powers vested in him. The other reason would be that UNIP is not an administrative authority or agent.

(ii) The Writ of Habeas Corpus.

The writ of habeas corpus is one of the prerogative orders and its use is restricted to the release of persons unlawfully detained. Unlawful detention can be effected by any person over another person. It is possible for an official of the Party, acting in the name of the

1. Kaira v. Attorney-General (1980) ZR 172.

2. Supra, p. 156.

3. Supra, p. 200.

4. Supra, p. 156.

Party, to unlawfully detain another person. In practice, the writ is used for the release from detention of a person detained under a Presidential order. The machinery of detention without trial is intended for circumstances where the ordinary criminal law or criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation. There may be various reasons for the inadequacy: there may be insufficient evidence to secure a conviction or it may be impossible to secure a conviction without disclosing sources of some information which it would be contrary to national interest to disclose.

It is obvious that these are matters of State in which the Party is not involved. Notwithstanding the 'supervision' of Government ministries by the sub-Committees of the Committee of Chairmen, criminal investigations and prosecutions are among the matters in which the sub-Committees do not interfere; consequently, it has been possible for a wife of an MCC and a former Prime Minister to be detained on suspicion of dealing in precious stones and have her application for release under the writ of habeas corpus rejected.¹

Although there is no decided authority yet on the matter, it is feasible that the writ of habeas corpus would issue against an official of the Party who unlawfully detained another person. The legal capacity of the Party in such a case would be irrelevant. The writ is directed against the custodian of the unlawfully detained person. In as far as detentions by the President are concerned, courts in Zambia enforce Zambian law but they also follow English decisions, particularly those decided under the Preventive Detention Regulations which were in force in Britain as a war-time measure.² In Zambia the criticism is

1. Mudenda v. Attorney-General (1979) ZR 245.

2. In re Sikhuka (1978) ZR 138, per Hadden, J., at p. 143.

that detention orders are made during peace-time (notwithstanding the so-called 'permanent emergency' caused by the security situation in southern Africa) and the detaining authority is regarded as exercising discretionary powers which the courts of law cannot inquire into. As a consequence, the writ of habeas corpus stands in most cases merely as a scare-crow to the administrators in most cases.

(iii) Prerogative Orders.

The role of UNIP hardly calls for the application of any of the prerogative orders, although these have been applied against the appropriate institutions. For instance, the prerogative order of certiorari has been used against the University of Zambia Senate Graduate Committee in a case in which it was held that the High Court had jurisdiction to hear and determine and quash a decision of the University Senate Graduate Committee.¹ Prohibition and certiorari will lie to prevent a body, which cannot be described as a court in any strict sense, from acting in excess of its judicial or quasi-judicial jurisdiction if it has legal authority to determine questions affecting the rights of subjects. The only possible area in which these orders might be used against the Party is that of the role of the Appointments and Disciplinary sub-Committee of the Committee of Chairmen which exercises quasi-judicial powers in its role as the organ with original and appellate jurisdiction in respect of discipline in the Party.² Persons appearing before the Party's disciplinary organs are often scared to question such proceedings and as a result not much is known of what goes on. Thus, although that sub-Committee does not belong to or falls within the traditional categories of bodies to which these orders may issue, such as tribunals, inferior courts, local authorities,

1. Mwisiya v. The Council of the University of Zambia (1981) ZR 247.

2. UNIP: quasi-judicial functions of the Central Committee and the National Council ad hoc Appeals Committee; Constitution, 1988, regs. 17 and 18, respectively, should similarly be subject to judicial review.

ministries, statutory and non-statutory bodies, however, these orders may be applicable if the sub-Committee was alleged to have acted contrary to or in breach of 'natural justice', e.g. where a member was expelled from the membership of the Party without being formally charged. It is possible that such a person may apply to the High Court for an order of either prohibition to prohibit the expulsion or certiorari to quash the decision of the Party. The Party in such proceedings would have to be proceeded against in a representative capacity. Under a One-Party system membership of the Party is important for some people and its denial, suspension or termination might result in serious financial consequences, e.g. loss of employment in the Party or of a seat in the National Assembly in case of a member of Parliament or a post in the public service.

Under English law, certiorari is not available to challenge the legality of decisions of trade unions or professional bodies, e.g. where the relations between the member and the trade union or professional body is based on contract.¹ The membership of a political organizations is considered to be contractual.² It is very likely that these English decisions are bound to be followed in Zambia vis-a-vis the relationship between UNIP and its members. But certiorari could, however, be invoked against the Party's acts which might be considered to be exercised under judicial or quasi-judicial powers, e.g. Central Committee's³ and National Council ad hoc Appeals Committee's⁴ disciplinary functions and appellate jurisdictions in disciplinary matters, particularly in cases of appeals against expulsion from the membership of the Party, in which these bodies perform quasi-judicial functions.⁵

1. R. v. BBC, Ex parte Lavelle /1983/ 1 WLR 23.

2. Conservative and Unionist Central Office v. Burrell (Inspector of Taxes) /1982/ 1 WLR 522, see Lawton, L.J. at p. 525.

3. UNIP: Constitution, 1988, Reg. 17.

4. ibid. Reg. 18.

5. R. Panel on Take-overs and Mergers, Ex parte Datafin Plc. /1986/ A.C. 815 see Sir John Donaldson, MR, at p. 839 where he says that the absence of legislation such as affects trade unions should not enable the Panel to "go on its way cocooned from the attention of the courts" while it performed quasi-judicial functions.

It is very likely that political leaders would resent such supervision of the organs of the Party by the courts. The courts, on the other hand, might find cases involving the functions of Party organs, 'too hot' to handle. That however, should not deter judicial review of quasi-judicial functions of some Party organs.

The order of mandamus is also one that might prove difficult to apply to the role of the Party in Zambia. Mandamus can be used in relation to want of performance by an administrative authority or agent of its statutory functions. UNIP operates under the provisions of its Constitution, which is not delegated legislation, but a political document. It could be argued that mandamus could possibly issue if the Party failed to carry out some of its functions as stipulated in its Constitution or the Constitution of Zambia, e.g. those requiring that the Party Congress should elect the Party President every five years¹ who become the sole Presidential Candidate in the election of the President of Zambia.² This function of the Party Congress is not discretionary, but obligatory and there is no alternative method of selecting the Presidential Candidate except through the machinery of the Party Congress. The only difficulty in obtaining the order of mandamus in such a situation would possibly arise in connection with the requirement of the locus standi of the applicant.

If the Party failed to convene the Party Congress, the Attorney-General or a member of the Party claiming to be a prospective Presidential Candidate, would probably satisfy the locus standi requirement. Since there is a public duty on the Party to convene the Party Congress and thereafter elect the Party President, mandamus would issue in the event of the Party failing to perform that function. The Court will, as a general rule, and in the exercise of its discretionary powers grant mandamus

1. UNIP: Constitution, 1988, Art. 73(9).

2. Zambia: Constitution of Zambia Act, 1973, Art. 38(3); supra, p. 137.

except when there is an alternative specific remedy at law which is not less convenient, beneficial and effective.¹

Under Zambia's One-Party system it is the Party around which political activities in the country, take place. Parliament and the Government still play equally important roles, but the Party organs assume a dominant role. The function of the prerogative orders are to regulate executive, governmental and other administrative powers; setting limits or compelling the performance of those powers. These orders were developed and applied for and in a political system of the UK dominated not by the ruling political party of the day, but by Parliament. In Zambia the ruling political party is permanently in office; some of its officials performing political as well as administrative functions.² Judicial review of administrative authorities should, under the One-Party system, take into account the role of UNIP in Zambia's public administration. For example, to be realistic, it might have to be declared that, in avoidance of doubt, the Party is an administrative organ of the Government and that its officers are public officers. It is unrealistic to cling to the notion that UNIP and the Government of Zambia are two distinct and separate institutions and that, for instance, certiorari or mandamus should apply only to the latter and not to the former. It would be ironic for the Party to decline to be closely identified with its Government. At the moment it appears as if what the politicians have joined together, the law purports to put asunder.

1. Zimba v. Registrar of Societies and Attorney-General (1981) ZR 335:

concerned applications for certiorari and mandamus to quash the first defendant's decision refusing to register a branch of a church suspected to be connected with the banned Lumpa Church of the late prophetess Alice Lenshina Mulenga; orders granted.

2. Zambia:

e.g. the Secretary of Defence and Security; Constitution of Zambia (Amendment) Act, 1980, No. 10, Art. 55A; supra, p. 205.

(iv) Equitable Remedies.

Declaration and injunction are major equitable remedies used in administrative law. Declaration is widely used not to coerce a party to do or refrain from doing, anything: it confirms the legal status of a relationship. A distinction has been drawn between a 'retrospective' and 'prospective' rulings in administrative law.¹ The former does not operate retrospectively to invalidate the particular decision that triggered the application for judicial review but merely confirms the status of the matter in issue as at the time of declaration, and the latter operates to govern future exercise of the discretion in question.

A declaration has its use on those occasions when it is declared that the act or decision of an administrative agency was ultra vires its statutory powers, or where a relationship was affected by a breach of natural justice, or where it is desired to challenge the legality of delegated legislation, or where it is intended to establish that an administrative agency is bound by an act or statement of its officer or representative. An application for a declaration might be accompanied by a claim for damages, for instance, in Valji v. Mulji² the appellants sought a declaration and damages for having been unlawfully expelled from an unincorporated association. The Court declined to decide upon the rights of persons associated together when the association possessed no property. For the action to lie, the appellants were required to show that by the expulsion they were deprived of a right of property vested in them as members of the association.

This decision was to some extent in line with the English decision in Young v. Ladies Imperial Club,³ in which the expulsion of

1. Lewis, C. "Retrospective and Prospective Rulings in Administrative Law", PA, Spring, 1988, 78-105, p. 78.

2. (1952) EACA 193.

3. /1920/ 2 KB 523.

a member from a proprietary club carried out by the members of the Committee and one of the members of the committee had not received a notice of the meeting at which the applicant was expelled, the expulsion was held to be invalid. However, the question whether the applicants in these two cases were justly expelled should not be affected by the fact that the association was or was not a proprietary one. That question would have been relevant as to claim for damages. A 'proprietary club' does not mean a club 'with property', for instance, UNIP owns buildings, companies and newspapers such as the Times of Zambia and the Zambia Daily Mail. It means a club in which each member owns a financial interest: he has invested money into the club and earns some income from what he has put into the association. UNIP is, therefore, not a 'proprietary club': nobody owns UNIP.¹

The Supreme Court decision in Nkumbula and Kapwepwe v. Attorney-General,² although the declarations sought were not granted, establishes the rule that a person could ask the courts of law to declare proceedings of the Party Congress 'unconstitutional' etc. That decision, however, left a number of vital questions unanswered, for example, it did not explain the legal basis of its intervention, or the status of the Constitution of UNIP, or the decisions of the Party Congress, or the locus standi of each of the applicants. On the facts of that case, only Nkumbula, who was a delegate at the Conference and had actually tried to lodge his nomination papers as a presidential candidate, had a sufficient locus standi to support his application for the declarations he sought, which included one that proceedings at the Conference should be declared null and void. The second applicant, who was not qualified to contest the presidency and was not a delegate

1. Infra, p. 386.

2. (1979) ZR 267.

at the conference, therefore had no locus standi in the matter; the manner in which the conference adopted the Party Constitution and elected MCCs and the President of the Party.

One of the consequences of the Court's intervention in that case, is that prima facie, 'any person' could apply for a declaratory ruling or for an injunction (prohibitory, mandatory or interlocutory) against the Party. A prohibitory injunction prevents the respondent from continuing with acts injurious to the applicant or in violation of a law. A mandatory injunction commands a person to act in accordance with the law where the applicant had a private right which arose out of a failure to perform some public duty. Interlocutory injunction, where granted, is intended to preserve the status quo between the parties until the matter in issue is disposed later.

In view of the power political parties possess over their members in particular and the public in general, there is a need for some form of external control over them. The nature and status of a political party, however, make declarations and injunctions ineffective remedies against abuse of political power by politicians. In the Nigerian case of Abubakar v. Abu Smith¹ it was stated that it is trite law that a court cannot make an unenforceable order, for instance, in a case in which there was undisputed averment that the amendment (to the party's constitution) complained of were popular and that even if the relief sought was granted, there would be nothing to prevent the respondents soon thereafter from summoning a meeting of the society and passing a proper resolution ratifying the amendments. Declarations, whether made to apply 'retrospectively' or 'prospectively', and injunctions (with the exception of mandatory injunction) are ineffective remedies with

1. (1973) SC 31, per Elias, CJ, at p. 35.

which to safeguard some rights and interests of the members of the Party or of the general public because they are bound to be ignored by a political organization which considered such court intervention as interference in political matters. They are, however, a deterrence in that no political party would like to be seen to be in conflict with the law. Most political parties would comply with court rulings. In Zambia if the Supreme Court had declared the 1978 Party Conference's adoption of the Party Constitution and the election of the President of the Party and the MCCs 'null and void', the Party would probably had ignored such a declaration, or, instead of going back to the Conference, the Party would have asked Parliament to pass a law validating the proceedings at that Conference.

In the converse situation, the Party, notwithstanding its unsettled legal capacity, can apply to the Court for a declaratory judgement on matters of concern to its role, for example if a Secretary-General of the Party were to refuse to accept his dismissal from that post by the President - which has not yet happened but which can happen - the Party could, through a representative application, seek the court's intervention and declare the dismissal to have been validly made. The Party could be granted an injunction restraining the former Secretary-General from acting as such or from remaining in office or in possession of Party property.¹ The anticipation that the Party might also seek the court's assistance, works in favour of the Party complying with a court order made against it. In that case it is not the fear of the equitable maxim that he who comes to equity must come with clean hands, but that he should be one who never ignored an equitable decree.

1. Nyasaland Trade Union Congress v. Nkolokesa (1963) R & N LR 184, a declaration was sought against a General Secretary (the respondent) by an unincorporated organization (the applicant) who had refused to accept his formal dismissal from office. Infra, p. 405.

Section 3. Administrative Controls and Remedies.

An administrative control or remedy is one provided for by a statute and does not involve a recourse to a court of law. Administrative controls and remedies can, therefore, be contrasted with judicial review remedies considered in the previous Section which are obtainable through a recourse to a court of law. This Section is confined to the role of UNIP in Parliamentary controls, the enforcement of the Leadership Code and other regulatory legislation concerned with the behaviour of those in the leadership of the Party and the Government.

(a) Parliamentary Controls.

Parliamentary controls of ministerial responsibility are carried out through Questions asked in the National Assembly by backbenchers and through such Committees of the House as the Committee on Delegated Legislation, the Select Committees and the Committee of the Whole House (which considers budget matters). The functions of these committees include maintaining a continuous scrutiny of the running of government institutions. Although at times a Parliamentary Select Committee has considered policy matters concerned with the role of UNIP,¹ Parliamentary scrutiny of public institutions does not include the administration of the Party, except in one respect in which the National Assembly scrutinises Party finances. That exercise, however, is restricted to the manner the Party spends its annual grant-in-aid from the Government. The grant is paid through the office of the Prime Minister, who answers questions in the House on how the Party utilized the money. The grant cannot be paid direct

1. Zambia:

The Report of the Special Parliamentary Committee, 14th October, 1977, Government Printer, Lusaka. (Chairman: J.M. Mwanakatwe).

to the Party because it is not a Government ministry or department to which a Government budgetary disbursement can be made. In as far as Government finances are concerned, UNIP is just a political party. The Government's Auditor-General audits the Party books only with regard to the grant and he is not authorized to have access to any books, records, returns or reports or other documents if such access would involve the disclosure of any matters or deliberations of a secret or confidential nature of the Central Committee, the Cabinet or any sub-Committee of the Central Committee.¹ This restriction merely expresses the Party's objection to control by Parliament, the institution which considers the Auditor-General's report; otherwise the Auditor-General has access to Government secrets concerned with his functions.

The principle that political organizations should receive some financial support from the Government to enable them operate efficiently, is acceptable under both multi-party and single-party systems. It is followed in the UK² and was adopted under Nigeria's multi-party system.³ In the USSR, as in the case of the UK, payment of such funds to the political party, the Communist Party of the Soviet Union, is not regulated by legislation.⁴ Unlike the UK but like Zambia, the power of the Communist Party to draw or receive financial support from the State is an essential element of the supremacy of the Party.⁵ Under a multi-party system all lawful political organizations receive such support and the question of 'supremacy' does not arise. In Zambia the payment of the grant and the Government's control - which is in fact

1. Zambia: Public Audit Act, 1980, No. 8, sec. 7(2)(ii).

2. Johnson, N., In Search of the Constitution, Pergamon, 1977, p. 45.

3. Nigeria: Constitution, 1978, No. 25, Art. 208(c).

4. McNeal, R.H., "The Beginning of Communist Party Financial Exactions from the Soviet State", in Loeber, D.A. (Ed.), Ruling Communist Parties and Their Status Under Law, Martinus Nijhoff Publishers, Dordrecht, 1986, p. 189.

5. ibid. p. 189.

ineffective since the Government does not tell the Party how to spend the money - is intended to narrow the gape between the Party and its Government; the Party, however, maintaining the dominant role, hence the refusal of Government access to its internal affairs.

The Party does use Parliament in carrying out certain public inquiries into allegations of maladministration, for instance, in a parastatal organization. For example, the Party Committee at the Place of Work¹ at Zambia Railways Headquarters, Kabwe, on 12th November, 1975, resolved that the Party carry out investigations of abuse of office in Zambia Railways. The Zambia Railways Amalgamated Workers' Union (ZRAWU) on 18th August, 1977, also resolved that Zambia Railways management should be investigated. The Party could not conduct such an inquiry due to its legal incapacity. President Kaunda had to set up a Commission of Inquiry,² under the chairmanship of the Minister of State, Ministry of Power, Transport and Communications, to investigate and report (to the Government) on the allegations of tribalism, nepotism, corruption and theft of property by persons in the management of Zambia Railways. The Commission recommended that in order to eliminate tribalism, nepotism and corruption and incidence of theft, which the Commission found to be rampant in the Railways, certain officials should be dismissed or transferred from Zambia Railways. The Commission found that "the problems identified are so complex and the evils are so ingrained that no single solution is tabulated or a set of solutions can be suggested which can have a lasting effect".³

This observation, although restricted to Zambia Railways, could also refer to any other parastatal organization in Zambia. These organizations are not effectively controlled by Parliament. The Report

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1. On Party Committees at Place of Work, infra. p. 432.
 2. Zambia: S.I. 1977/165, Schedule, Term of Reference, 1.
 3. Report of the Commission of Inquiry into the affairs of Zambia Railways; March, 1978, p. 95.
(Chairman: J.C. Mumpanshya).

was followed by dismissals of some top personnel and re-organization of Zambia Railways management. The dismissal of top management was carried out by the President, who is a component of Parliament; to that extent it could be said that the inquiry and the implementation of its recommendations proved an effective control by Parliament of a parastatal organization. Otherwise, Parliamentary controls are often restricted to Government ministries.

(b) Control through the Leadership Code.

The first few years of Independence made UNIP leadership aware of a number of truisms of independence, and among these were that some of the leaders who were engaged in the struggle for self-government and independence, had looked forward to comfortable life after achieving self-rule; secondly, that the socio-political system inherited at independence was basically Capitalist, and, thirdly, that the masses had got an impression that independence had brought only a change of masters: a replacement of colonial by local masters. There were some obvious fears in the UNIP leadership that the 'masses' might organize against the new rulers in the same manner as they had organized against colonial rulers. The fear arose from the fact that while the social conditions of the masses remained unchanged or in some cases deteriorated, that of the leaders flourished. Consequently, some form of control of economic activities had to be introduced of those in the the leadership of

- (a) the Party,
- (b) the Government,
- (c) any corporation, body or board, including institutions of higher learning, in which the Party or Government had a majority or controlling interest,
- (d) local authority,
- (e) any commission established by or under any law, and
- (f) the ZCTU or any registered trade union.¹

1. Zambia:

The Leadership Code, S.I. 1976/88, Reg. 2, the First Schedule. In Tanzania the 'Leadership Code' provisions are contained in the State Constitution, the Elections Act, 1970, No. 25 (now No. 1 of 1984) and the Civil Service Regulations, G.N. 1970 No. 228: sec. 2, the Committee for the Enforcement of the Leadership Code Act, 1973, No. 6.

On the eve of the introduction of the Leadership Code, the emphasis was placed on the establishment of the One-Party system and that the Code was an aspect of that system:-

I should stress that the leadership code is part and parcel of One-Party Participatory Democracy. Under the new social order, the leadership are like the judiciary and the church; mirrors through which we, as a nation should see how clean or how dirty we are.¹

The Constitution of Zambia establishes a Leadership Committee composed of five members appointed by the President,² which is empowered to make regulations (to be known as the Leadership Code), applicable to the office-holders, their spouses and children under the age of twentyone years, in the institutions listed in the Leadership Code. These leaders are required to declare their assets and liabilities to the Chairman of the Leadership Committee, who happens to be the Secretary-General of UNIP. The President may appoint any other person as the Chairman of the Committee, however, it is a firm policy of the Party that the superintendence of the conduct and discipline of those in the 'leadership of the nation', is a matter for the Party. The Leadership Code was, therefore, intended to provide a form of 'national control, of those persons in the leadership of public institutions, including the Party.

The provisions of the Leadership Code itself, tend to blur that perception by requiring that every person employed in any of the stipulated institutions and earning more than K2,500 per annum (which salary is below most high and low ranking officers, including typists and secretaries) should not be in receipt of more than one income. This means that no 'leader' should engage in commercial activities such as letting of houses or business enterprises or private professional practices of lawyers, doctors or accountants. Some of these

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| 1. UNIP: | <u>Leadership Code and Responsibilities of the Leadership in the Creation of a New Social Order</u> ; President Kaunda, opening National Council, 2nd December, 1972. |
| 2. Zambia: | Constitution of Zambia Act, 1973, Art. 32 as amended by the Constitution (Amendment) Act, 1975, No. 22. |

prohibited economic activities are 'harmless' to the society, if anything, they are beneficial, for example if leaders engaged in commercial and other financial businesses, they are bound to provide employment to their fellow-countrymen. The prohibition, however, is based on the notion that leaders were bound to use their official positions to enrich themselves. Some of the prohibited activities could be considered as 'harmful' to the society, for instance, abuse of office through bribery or use of official information for personal ends.¹

Members of the public are strongly in favour of a vigorously enforced leadership code; hence, UNIP's National Council resolution that leaders opposed to the Leadership Code, should resign and that those in breach of the Code should have their salaries deducted by fifty per cent (50%, during the months of July and August, 1975).² Without a further notice, this resolution was implemented and deductions were made from the salaries of thousands of 'leaders' who were in breach of the Code, mainly having failed to declare their assets and liabilities. Since the National Council of the Party does not have legislative powers, the deductions were unlawful and were later refunded to the leaders. The Constitution was consequently amended to provide that where, as a result of an inquiry held by the Leadership Committee, the Committee was satisfied that a holder of a specified office in relation to whom such an inquiry was held had failed to comply with, or had committed a breach of the Leadership Code, the Committee may impose on the erring leader any of the penalties, that is censure, suspension from office for a period not exceeding six months, or forfeiture of emoluments of the specified office or any other income in whole or in part for such period as it may deem fit.³

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| 1. Zambia: | Leadership Code, S.I. 1976/88, Regs. 6, 7 and 8. |
| 2. UNIP: | National Council, July, 1975, Resolution (d). |
| 3. Zambia: | Constitution of Zambia Act, 1973, Art. 33A(4), as amended by the Constitution (Amendment) Act, 1975, No. 22. |

The role of UNIP in the enforcement of the Leadership Code is through the Secretary-General's chairmanship of the Leadership Committee. Although members of the public are keen to see the Code firmly enforced and are allowed to make allegations to the Secretary-General that a leader had not complied with, or, had committed a breach of, the Code,¹ in practice it is difficult for the public to 'see how dirty the leadership is' because access to declarations of assets and liabilities of leaders is restricted. In practice people are scared of asking for the permission to inspect any declaration for fear of unknown consequences. Members of the security forces are known to have regular access to declarations in their investigations against leaders under the Corrupt Practices Act, 1980² which is applicable to persons working or holding office in a 'public body', which include the Party, the Government, a local authority, parastatal organization or any board or commission appointed by the Party or Government or under any written law.³ The Leadership Committee and the Anti-Corruption Commission complement each other's efforts. The former is concerned with the leaders' financial or commercial activities and the latter is concerned with investigations of and prosecutions for abuse of office. Certiorari, mandamus and injunction could be invoked against the Secretary-General's refusal of permission to inspect a declaration of assets and liabilities although he acts in his discretion if it can be shown that the discretion was wrongly or unreasonably used.

(i) Method of Enforcement of the Code.

UNIP does not play a part in the enforcement of the Leadership Code; however, through the chairmanship of the Leadership Committee by the Secretary-General, the enforcement of the Code has become part and parcel of UNIP's role. Allegations of breach of the Code are made to the

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1. Zambia: Leadership Code, S.I. 1976/88, Reg. 12.
 2. 1980, No. 14.
 3. ibid. sec. 3.

Leadership Committee in secret but the Committee is required to observe rules of natural justice, for instance, the accused leader should be informed in writing the nature of the breach of the Code he is accused of committing and he is allowed legal representation. Although a leader cannot appeal against the decision of the Leadership Committee,¹ that should not per se stop him from applying for judicial review of the Leadership Committee's decision if he were dissatisfied with it or what transpired at the inquiry. In addition to the sanctions provided for by the Constitution of Zambia referred to on the previous page, the Leadership Committee may direct that the leader dispose of his share in the offending economic activity or dispose part of his land if it were in excess of the allowed ten hectares.² Penalties such as censure, suspension or forfeiture of emoluments are effected by the Committee through the appropriate institution of deployment of the leader found in breach of the Code.

Where the Leadership Committee is of the view that the allegation against a leader is too serious to warrant a removal from office, it must refer the matter to a Tribunal consisting of a Chairman appointed by the Chief Justice, who should be a person qualified to be appointed a judge of the High Court or a serving judge of the High Court or the Supreme Court. So far only one case was referred to the Chief Justice on an allegation of a Minister not declaring fire-arms. The matter was dropped following the Minister's removal from office. With the enactment of the Corrupt Practices Act, 1980, criminal aspects of maladministration are now dealt with under that Act. The emphasis in the administrative control of those in the leadership of public institutions have shifted to penal sanctions. One of the reasons for this shift in emphasis might be that the Party and its Government

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1. Zambia: Constitution of Zambia Act, 1973, Art. 33A(5). A leader may appeal against the decision of the Leadership Code Tribunal under this same provision.
 2. Leadership Code, S.I. 1976/88 Reg. 11.

are fighting a losing-battle against abuse of office through corrupt practices such as corruption and bribery. Although the Leadership Code provides that a leader should not directly or indirectly solicit or accept benefits or gifts on account of anything done or to be done or omitted to be done by him in the discharge of his duties,¹ it does not provide for criminal prosecution for abuse of office.

(ii) Effectiveness of Controls through Leadership Code.

The inclusion of UNIP in the categories of public institutions to which the Leadership Code should apply, was probably influenced by President Kaunda's view that the Code was part and parcel of the One-Party system. The Zambian form of the Leadership Code was adopted under the multi-party system of Nigeria² and Papua New Guinea.³ The major differences between these Codes and the Zambian Code, were with the chairmanship of the leadership code enforcement agency and the concept or the philosophy behind the role of a code of leadership conduct. In Nigeria the enforcement of the Code of Conduct was entrusted to a Code of Conduct Bureau, composed of nine members appointed by the Senate and a Code of Conduct Tribunal under a Chairman who was required to be a person qualified to hold office of a judge of a superior court of record in Nigeria, appointed by the President.⁴ Probably because the

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1. Zambia: Leadership Code, S.I. 1976/88, Regs. 6 and 7.
 2. Nigeria: Report of the Constitution Drafting Committee, Part II; 1976, p. 40; Nigeria Federal Ministry of Information, Lagos. (Chairman: Chief F.R.A. Williams).
 3. Goldring, J., The Constitution of Papua New Guinea; Law Book Company, Sydney, 1978, p. 33.
 4. Nigeria: Constitution of the Federation of Nigeria, 1978, Fifth Schedule, Par. 15(1)(a) to (d). This provision was saved when the Constitution was suspended (Constitution (Suspension and Modification) Decree, No. 1, Clause 1(2), 31st December, 1983) and is enforced by a military tribunal (Recovery of Public Property (Special Military Tribunals) Decree, No. 3, Clause 3; 31st December, 1983).

enforcement was entrusted to public officers and not to politicians as in the case of Zambia,¹ some public actions were taken against political leaders accused of being in breach of the Code of Conduct, for instance, in Ebiesuwa v. Commissioner of Police,² it was held that a Member of the then Ondo State House of Representatives who was a legal practitioner by profession, was a leader as defined by the Code of Conduct and as such he could not be a Member of the House and practice law at the same time against the provision of the Code which forbade leaders engaging in commercial activities.³ In Papua New Guinea, in The State v. Independent Tribunal, Ex Parte Moses Sasakila,⁴ the applicant, a Minister in the Government of Papua New Guinea, failed to stop his removal from the office after he was found to be in breach of the Leadership Code: he had failed to declare his assets and liabilities as required by the Code. That punishment was considered too severe and the law was later changed to provide for censure, suspension from office and forfeiture of emoluments.⁵

Although in Tanzania it has been claimed that the leadership Code of that country has been effectively enforced,⁶ the Leadership Codes of Tanzania and Zambia are ideologically oriented. The chairmanship of the Leadership Committee in Zambia is based on the notion that the Party is the custodian of public morality and the enforcement of the Code is done in the context of Humanism: avoidance of the exploitation of man by man. Administrative controls of those in the leadership are

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| 1. Zambia: | The Leadership Committee is composed of the Secretary-General (Chairman), the Prime Minister, Secretary of Defence and Security and two MCCs. |
| 2. (1982) 3 NCLR 339. | |
| 3. Nigeria: | Constitution, 1978, <u>op. cit.</u> , Fifth Schedule, Clause 2(a) and (b). |
| 4. (1976) PNGLR 391 | |
| 5. Papua New Guinea: | Leadership Code (Alternative Penalties) Act, 1977. |
| 6. Nyerere, J.K., "The Arusha Declaration After Ten Years", in Coulson, A., (Ed.) <u>African Socialism in Practice; The Tanzanian Experience</u> ; Spokesman, 1979, p. 35. | |

intended to reform 'capitalist tendencies' in the leadership and not to punish those who fail to comply with the Code. The Secretary-General is expected to assess political consequences of any sanction applied against an erring leader both on the leader as well as the image of the Party. The result of such consideration is contradictory in that while the Party might like to punish breaches of the Leadership Code, vigorous enforcement might reveal the depth and width of financial and commercial involvement of many leaders in the service of the Party and Government. Consequently, the enforcement of the Code in Zambia, unlike in Nigeria and Papua New Guinea, has been 'invisible', for instance, not through formal charges before the Leadership Committee or Tribunal, but through reshuffles in the leadership of the Party, the Government and parastatal institutions.

That public officers, unless restrained, would use their official positions to favour their own social interests, seems to be one of the common grounds behind the introduction of leadership codes in many countries. Ostentatiously opulent living among those in the leadership of the political party, the Government or parastatal bodies, notwithstanding the presence of the Leadership Code, has adversely affected UNIP's claim that it stood for and was working towards a socialist classless society in Zambia. The Presidential exemption from the provisions of the Code¹ has enabled certain leaders to retain public office while engaging in private businesses. Such option devalues the whole concept of administrative control of those holding office in public institutions. For those who are not exempt but remain surrounded by opportunities to make economic gains while they occupy public office, the rewards for successful avoidance or evasion are open to them to follow. Under such circumstances, the Code could hardly be effectively enforced.

1. Zambia:

Leadership Code, S.I. 1976/88, Reg. 5.

(c) Control through the Commission for Investigations.

The recommendation that a public officer should be appointed to receive and investigate complaints from members of the public against unfair or administrative abuse of office or authority under the One-Party system, was made by the NCEOPPDZ¹ and was accepted by the Government.² The officer was to investigate allegations of tribalism, nepotism, intimidation and all forms of discrimination taken by or on behalf of any Government Ministry or the Party. The Independence Constitution (of 1964) did not contain the office of the ombudsman, probably because such an office did not then exist in the UK; it was established in 1967.³ The institution of the Justiteombudsman was first established in Sweden in 1713⁴ and it has been statutorily adopted in one form or another in many African states such as Tanzania,⁵ Ghana,⁶ Sudan⁷ and Nigeria.⁸ In Zambia the Investigator-General (the Ombudsman) who should be a former judge of the High Court or the Supreme Court or a person who is qualified to be appointed a judge of the High Court, together with three Commissioners of the Commission for Investigations, are appointed by the President.⁹

The institutions and public officers open to investigations

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| 1. Zambia: | NCEOPPDZ, Report, 1972; p. 38 par. 129(6) (d). |
| 2. | NCEOPPDZ-SRAG, 1972; pp. 18-19. |
| 3. UK: | Parliamentary Commissioner Act, 1967. On his role see: Bradley, A.W., "The Case-Work of the British Parliamentary Ombudsman", <u>The Ombudsman Journal</u> , No. 3, September, 1983, p. 12. |
| 4. Rowart, D.C. (Ed.) | <u>The Ombudsman, Citizen's Defender</u> ; Allen, 1968, p. 24, and Stacey, F., <u>Ombudsmen Compared</u> ; Clarendon Press, Oxford, 1978, p. 1. |
| 5. Tanzania: | Interim Constitution, 1965, No. 43, Cap. 596, Art. 67(4) and Permanent Commission of Inquiry Act, 1966, No. 25, sec. 3. |
| 6. Ghana: | Constitution, 1969, Arts. 100 and 101. |
| 7. Sudan: | Central Bureau of Public Control Act, 1975. |
| 8. Nigeria: | Public Complaints Commission Decree, No. 31, 16th October, 1975. |
| 9. Zambia: | Constitution of Zambia Act, 1973, Art. 118(2) (a).
The previous three and the present (1989)
Investigator-Generals have come from the Supreme Court. |

by the Investigator-General are identical to those covered by the Leadership Code.¹ His functions are to investigate public complaints and to redress genuine injury suffered by members of the public as a result of maladministration in the Party or the Government. The ombudsman does in the process defend and legitimize administrative decisions and actions by upholding them as validly made and dismissing a complaint as frivolous, vexatious, trivial, unwarranted or not made in good faith. He can decline to investigate a complaint on the ground that the complainant had not exhausted available remedies under the existing administrative practices or written law, or, that investigation might be against public policy. The powers of the ombudsman to investigate or not are probably beyond judicial review, though the only case on that point is unsatisfactory. In Re Fletcher's Application (Note)² the Court of Appeal in a note, and not in a reasoned decision, declined to grant mandamus to compel the Parliamentary Commissioner to conduct an inquiry. In Zambia the volume of complaints is large, the number of cases investigated is small and those concerned with the Party are negligible, as the following Table shows:

TABLE C: Complaints to Investigator-General (in brackets against UNIP).³

Complaints	1978	1979	1980	1981	1982	1983
Received	500 (5)	562 (4)	555 (1)	557 (3)	713 (3)	989 (3)
Declined	243 (1)	275 (2)	166 (1)	228 (1)	320 (3)	495 (3)
Inquired	275 (0)	287 (0)	389 (0)	329 (0)	393 (0)	494 (0)
Completed	175 (0)	171 (0)	158 (0)	111 (0)	119 (0)	151 (1)
Withdrawn	24 (4)	13 (0)	18 (0)	14 (0)	16 (0)	17 (0)

The complaints against UNIP are extremely low either because the ombudsman declines to investigate the Party or that Party functionaries are investigated under other public institutions, e.g. the DG through the District Council. The complaints against UNIP alleged failure by

1. Zambia: Constitution of Zambia Act, 1973, Art. 117(4); supra, p. 269.
2. /1970/ 2 All ER 527.
3. Compiled from the Investigator-General's Annual Reports of the indicated years; infra, p. 279.

the Party to pay gratuity and allowances,¹ failure to provide employment to the complainant, suspension from duty and non-payment of over-time,² failure to pay terminal benefits,³ wrongful termination of employment,⁴ failure to provide employment following the complainant's sponsorship for a political course abroad, lack of promotion and denial of housing allowance,⁵ failure to employ the complainant whose father had died in the struggle for freedom and failure to reinstate the complainant after an acquittal on a charge of theft by a servant.⁶ Although these cases were concerned with the administration of the Party, they were, except for two, concerned with employer-employee relationship and not maladministration.

These cases do not explain what happens to complaints against leading Party functionaries such as MCCs, PPS and DGs in their role as provincial or district administrators. The almost nil-return on complaints against the Party might suggest that the ombudsman probably declines to investigate complaints against Party functionaries; that is possibly due to want of suitable sanction that the Investigator-General could recommend. For instance, if an individual were to complain that a Section or Branch Chairman had rejected his application to join the Party, the ombudsman could not recommend that the person be admitted into the membership of the Party as that would be shifting decision-making from the Party to the administration. In his reports to the President the ombudsman can recommend that compensation be paid to any person who suffered loss or injury as a result of a misconduct or an abuse of office or authority.⁷ No other remedy is expressly provided for. The importance of the

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| 1. Zambia: | <u>Investigator-General's Report, 1978, p. 52.</u> |
| 2. | " 1979, p. 55. |
| 3. | " 1980, p. 73. |
| 4. | " 1981, p. 65. |
| 5. | " 1982, p. 80. |
| 6. | " 1983, p. 71. |
| 7. | Constitution of Zambia Act, 1973, Art. 117A(1)
as amended by the Constitution (Amendment)
Act, 1974, No. 18. |

inclusion of the Party among public bodies whose activities were to be scrutinized by the Investigator-General, lay in the expectation that any shortcomings in the administration of the Party could be investigated to ensure that, notwithstanding the establishment of the One-Party system, every person in Zambia continued to enjoy life, liberty and freedom of expression, movement and the protection of the law as guaranteed by the Constitution of the Republic.¹ The apparent non-investigation of the role of MCCs, PPS and DGs, whose functions are notoriously known to sometimes impinge on the liberty of the citizens, is evidence that because of its elusive legal status UNIP is still a political party notwithstanding its 'supremacy' : it is an odd 'public body'.

CONCLUSION.

This Chapter has considered the meaning of 'administrative law', the recent developments in English administrative law and rules of procedure vis-à-vis judicial review of functions of public institutions and judicial review of the activities of UNIP's organs in Zambian administrative system. The role of UNIP in administrative law is a novelty brought about by the One-Party system. Accordingly, it is not possible to find a precedent in English authorities or Zambian authorities based on English law for the judicial review of the role of a political party by the High Court. The jurisdiction of the High Court in Zambia, however, should be adaptable and the Court should not shrink from entertaining applications on the role of the Party merely because UNIP had no statutory origin. Judicial review of the functions of the Party should, however, be restricted to functions performed under the provisions of both the Constitutions of the Party and of the Republic, which might be described as public functions, and, quasi-judicial functions. The rest of the functions of the Party should be considered as internal affairs of the Party not susceptible to judicial

1. Zambia:

Constitution of Zambia Act, 1973, Art. 13.

review.

Judicial review involves legal technicalities. It is costly and suitable for the elite living in the affluent emerging urban society. The elite are rarely victims of maladministration as they are often well served and treated by their fellow elite in public administration. It is the 'common man and woman' who receive a raw deal. Legal aid should be made available to persons seeking judicial review of administrative action.¹

Although the Leadership Committee and the Commission for Investigations have yet demonstrated their potential, there is a need for decentralization of these public bodies to enable them 'go to the people' and operate among the people at provincial or district level, where there are often reports of administrative arbitrariness both on the part of the Party and Government leadership. One cannot exaggerate what such institutional arrangements alone can achieve. It would be naive to conclude that formal arrangements alone can safeguard the interests of the weak in society. But such arrangements could offer the poor and the peasants an opportunity to seek redress (from the Government) against the 'Government'; a term used to refer to any official action or decision of public officers.

Control of administrative actions and decisions for the sole purpose of safeguarding interests of members of the public cannot be easily achieved because public institutions ostensibly constituted and empowered to protect, inter alia, interests of the members of the public e.g. by investigating and reporting on allegation of misconduct or abuse of office or authority by persons holding public office, have been turned into watch-dogs for the Government. Consequently, the effectiveness of the Leadership Committee, Anti-Corruption Commission and the Commission for Investigations is, negligible in as far as their role of being watch-dogs against maladministration, particularly in the Party, is concerned.

1. Zambia: The Legal Aid Act, 1967, No. 30, Cap. 546 does not expressly provide for legal aid in such cases and there is no case in which legal aid was either granted or denied.

CHAPTER VII.THE ROLE OF UNIP IN THE CONSTITUTION AND FUNCTION OF PARLIAMENT.Approval of Candidature, Conduct of Election Campaigns and the Role of Backbenchers.Introduction.

The NCEOPPDZ did not make a recommendation on the role of UNIP vis-a-vis the constitution and function of Parliament, however, it expressed the view that the door to the National Assembly should be open to all citizens 'without the Party vetting them'.¹ That view of the Commission has been ignored by the Party. Although during the last two National Assembly elections (1983 and 1988) the Party introduced electoral devices aimed at allowing more people to stand for election, e.g. the abolition of primary elections and the allocation of constituencies to the candidates by the Party's Central Committee, it however, intensified its vetting mechanism to the point that it is still conducting a form of primary election. Primaries and vetting are, among other things, aimed at constituting a Parliament composed of people who are most likely to work in accordance with Party policies and respect Party leadership.

National Assembly elections under a One-Party system are not conducted to solve political, social or economic problems, but to renew and give legitimacy to the permanent and continuous leadership of the Party. The people participate in the electoral processes not because they are compelled or intimidated to do so, but because it is the political system of the country and it does provide them with an opportunity for political activity and expression. The electoral process can be conceived as having four major dimensions; first, registration of voters by the Electoral Commission, a Government Department, second, the self-nomination by the candidates and their approval by the Party, third, the election campaigns and the election of MPs, and fourthly, the role of the National Assembly.

1. Infra, p. 286.

Section 1. The Relationship between the Party and the National Assembly.

The adoption of a One-Party Constitution in Zambia in 1973 elevated the position of UNIP above that of a political party under a multi-party system. The Party could be described as a 'Constitutional organ' in that its presence in the administration of Zambia is recognized by the Constitution of the Republic. Although one might hypothesize that decisions and actions of the Party might be subject to judicial review,¹ that is not because the Party has the status of an organ of the State, but it is because the principles of good administration, which bear a strong resemblance to the substantive rules of judicial review, require that contractual as well as non-contractual rights of persons dealing with organizations be protected, either by public or private law. The relationship between the Party and Parliament is not similar to that between two Ministries of the Government, e.g. the Ministry of Foreign Affairs and the Ministry of Youth and Sports. The relationship between the Party and Parliament is that between a political party and an institution of State. Consequently, while Ministries operate on equal basis, the Party purports to assume a superior position to that of the Government, that is over Parliament and Ministries.

(a) Parliament not an 'Opposition Party'.

In the middle of 1977 President Kaunda addressed a special meeting of Parliament and asked the National Assembly to consider a programme of action aimed at making Zambia survive the effect of the economic situation brought about by (a) the overall world economic situation, and (b) the rebellion in the neighbouring SR.² The National Assembly appointed a Special Parliamentary Select Committee to examine

1. Supra, p. 251.

2. Zambia: Report of the Parliamentary Special Select Committee; 14th October, 1977, p. 19. Government Printer, Lusaka. (Chairman: J.M. Mwanakatwe).

the President's speech and make recommendations thereon. In its report the Select Committee, inter alia, criticised the mode of the election of MCCs at the General Conference of the Party and the appointment of the Prime Minister and recommended that MCCs be elected provincially and the Prime Minister should be appointed from among elected members of the National Assembly only, respectively. Addressing a meeting of the National Council of the Party, the President said that if he had sought to address himself to changing the rules in the constitution of the Party on the election of MCCs, he would have called a meeting of the National Council which was the relevant body to recommend such matters to its General Conference which was the only competent body to amend the constitution of the Party. Parliament, he said

is not an opposition device to the Party itself or to other Party institutions under our One Party participatory democracy. I regard Parliament as a Committee of the National Council charged with the responsibility of enacting laws of this country.¹

It could be objected that Parliament whose members are directly elected by the general electorate, should be said to be a committee of an organ of the Party which is itself unelected and unrepresentative of the people of Zambia. In a multi-party system it would prima facie be 'wrong' to say that Parliament composed of members from several parties is a committee of one of the parties, for instance, the ruling party. In a one-party system, the contention simply means that all the members of the National Assembly are accountable to the one party to which they belong. Accordingly, the President said that all the members of the National Assembly were members of the National Council and the General Conference which were organs which had "correct and balanced representation of the full Party leadership" and the appropriate body to discuss Party matters.

1. UNIP: 11th National Council, 12th-15th December, 1977. See also President Kaunda's remark to backbenchers' speech in Parliament that they "have left some of us with the impression that they are seeking to be an Opposition Party in our One Party participatory democracy", National Council, 30th June, 1975, 'Watershed Speech', p. 23.

What was in issue in the 'conflict' between the President and the National Assembly, was Party supremacy; the Party was contending that the National Assembly should not discuss matters pertaining to the organization of the Party: a point which indicates that the Party was not perceived as an organ of state otherwise the National Assembly is free to discuss any matter or institution of state. In Tanzania the relations between the Party (CCM) and Parliament is clearly spelt out; viz

All members of Parliament shall be a Committee of the National Conference whose function shall be to ensure the implementation of Party policy in all activities carried out by Parliament.¹

This provisions² is also contained in the Constitution of Tanzania² and thus leaving no one in doubt about the role of the National Assembly and/or its relationship with the Party. One of the reasons why such political parties as CCM and UNIP insist in claiming that the National Assembly is 'a committee' of one of its national organs, is that the claim provides the means or justification for the approval or disapproval of candidates for election to the National Assembly. If the link between the party and the National Assembly were severed, there would be no basis upon which the Party vets Parliamentary candidates. The fact that a National Assembly is referred to as 'a committee' of an organ of the Party is not of any significance. What is crucial is whether the vetting and electoral system is democratic in its practical operation and effect so that the people are afforded the opportunity to elect their representatives without hinderance, and, that Parliament carries out its functions independent of the Party and/or its national organs. The constitution of the National Assembly is therefore, an aspect of the ligitimation of the exercise of power by the Party leadership in general.

1. Tanzania: Art. 59(11) CCM constitution, 1977, now Art. 67(11) Katiba ya Chama cha Mapinduzi, 1984.

2. Constitution, 1977, Art. 50(7).

(b) The Approval of National Assembly Candidature.

In Tanzania there are national members elected by the National Assembly and there are members who represent mass organizations affiliated to CCM in addition to those elected by the general electorate: in a Parliament of 238 members, 127 non-elected and 111 elected members, that is 53% are appointees of the executive and 47% elected. In Zambia the NCEOPPDZ recommended that chiefs, churches, the civil service, commercial, professional and educational institutions, the security forces and the labour movement, should be directly represented in the National Assembly.¹ This recommendation was not accepted by the Party.² Accordingly, the National Assembly is composed of 125 elected and 10 nominated (by the President) members. The election of the 125 members is held every five years³ and a citizen of Zambia above the age of twentyone years, a member of the Party, literate in the official language,⁴ is, unless otherwise disqualified, qualified to stand for election. The disqualifications include being under allegiance of another country other than Zambia, having been declared of unsound mind or bankrupt or having been convicted of a prescribed offence.⁵

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1. Zambia: NCEOPPDZ Report, 1972, p. 16, par. 61(3).
 2. NCEOPPDZ-SRAG, 1972, p. 7,
 3. Constitution, 1973, Art. 93(3).
 4. ibid. Art. 67(a) to (d). Almost all Commonwealth African Independence Constitutions provided that the business of Parliament be conducted in the English language, for instance the Constitution of Ghana, (1957) Sec. 27, later removed by Art. 20 of the Republican Constitution of 1960; Tanganyika (1961) Secs. 18 and 19, later removed by Art. 24 of the Republican Constitution of 1964; Kenya (1963) Sec. 40(1) (b) and Nigeria (1960) Art. 254.
 5. ibid. Art. 68(1) (a) to (e) and secs. 3 and 8(a) to (f) of the Electoral Act, 1973, No. 44, Cap. 19, as amended by sec. 3 of the Electoral (Amendment) Act, 1983, No.2. Prescribed offences include treason, murder, rape. The NCEOPPDZ was of the view that there would be no Party vetting of Parliamentary candidates; see Report loc. cit., p. 17 par. 67.

UNIP has not produced a settled policy on the role of public servants in Parliamentary politics. The number of public officers, which include officers from the army and the police, standing for election to the National Assembly, had been on the increase during the 1978 and 1983 General Elections. After the 1983 election, the Central Committee ruled that public officers should resign their posts before they stood for election and that policy was reflected in the amendment to the Constitution to the effect that persons holding or acting in any office in the defence forces, the police reserve or the police, intelligence, Service Commissions, parastatal organizations and the Party, were not qualified to be elected as members of the National Assembly unless they resigned from such posts or offices or appointments prior to standing for election.¹ The intention behind this policy besides the control of public officers engaging in active politics, was also to prohibit unsuccessful public servants returning to their posts after suffering defeat some of whom had shown bitterness against the Government. The principle was acceptable in as far as it concerned successful public officers elected to the National Assembly. There was pressure on the Central Committee that unsuccessful public servants should be allowed to return to their posts.

Before the 1988 General Election the Constitution was amended; the provision that a public officer "shall not be qualified to be elected as a member of the National Assembly unless he has resigned from such post, office or appointment" was deleted and substituted by "shall vacate such post, office or appointment immediately upon being declared elected."² A public officer intending to stand for election should proceed on leave fourteen days after the dissolution of Parliament or after the date of the publication in the Gazette of a date of a by-election.³

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1. Zambia: Constitution of Zambia (Amendment) Act, 1986, No. 3, Art. 7 amending Art. 68(5) of the Constitution of Zambia Act, 1973, No. 27.
 2. Constitution of Zambia (Amendment) (No. 2) Act, 1988, No. 23, Art. 2 amending Art. 68(5), aforementioned.
 3. ibid. inserting a new Art. 68(6).

This amendment showed that UNIP was inclined to allow more open election and to expose the political system to popular scrutiny. This effort marks a renewed quest for legitimacy of the One-Party system. The leadership realizes the centrality of elections as a means of closing the gap between those in the leadership and the electorate. This development clearly distinguishes recent liberalization in the Zambian electoral system compared to that operative at the introduction of the One-Party system in 1972-1973. Prior to the 1983 Parliamentary election, the Party held primary elections to select three candidates in each Constituency who were presented to the Central Committee of the Party for approval or disapproval.¹ The electors in the Primary Elections were Party officials at the Regional, Constituency and Branch levels.² Primary Elections were abolished before the 1983 General Election ostensibly on the ground that Party officials who constituted the electoral colleges, were open to bribery. The system, however, had been criticised as restrictive and undemocratic in that the nomination of Parliamentary candidates was at the mercy of Party cabals.

The primary election system had been 'copied' from CCM's system in Tanzania where the Special Annual District Conference considers applications for elections to the National Assembly³ and expresses its preferences - through preference certificates⁴ - to the National Executive Committee of CCM. The National Executive Committee approves a maximum of two candidates per constituency to fight an election to the National Assembly.⁵ The primary election or nomination system works against those who the Party leadership at the grassroots level might consider a potential threat to their positions of leadership.

Following the abolition of primary elections in Zambia after

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| 1. Zambia: | Constitution of Zambia Act, 1973, Arts. 67 and 75. |
| 2. | <u>ibid.</u> Art. 75(3) (a) to (c). |
| 3. Tanzania: | Elections Act, 1985, No. 1, secs. 38 and 41(1). |
| 4. | <u>ibid.</u> sec. 41(4). |
| 5. | <u>ibid.</u> sec. 43 and CCM Constitution, 1977, Art. 61(6), now Art. 69(9), Katiba ya <u>Chama Cha Mapinduzi</u> , 1984. |

the 1978 General Election, a prospective candidate delivered his application for adoption by the Central Committee to the Returning Officer appointed by the Electoral Commission, and

Unless the Central Committee is satisfied that the adoption of any particular candidate would be inimical to the interests of the State, it shall adopt every applicant for adoption as a candidate.¹

Before 1988 adoption was made on the basis of this provision in the Constitution of Zambia. During and after the 1988 General Election, the adoption was and will be done by the Committee of Chairmen and not by the Central Committee as a whole on the basis also of the provisions of the Party Constitution which provide that the Committee of Chairmen would not adopt any person in whose opinion was engaged in corrupt practices, or smuggling, or trafficking in drugs, or poaching, or was a drunkard or was in breach of the Leadership Code or consistently committed offences against the Constitution of the Party.²

There is no definition of the word 'inimical' or the phrase 'inimical to the interests of the State'. There is no judicial interpretation of either the word or the phrase because there is no judicial review of the role of the Central Committee (now the Committee of Chairmen) in its adoption function: the Courts' jurisdiction is ousted.³ The phrase has a sinister connotation and prima facie covers serious allegations of criminal misconduct that would justify placing such a person under a detention or restriction order under the Preservation of Public Security Act.⁴ Persons advocating a re-introduction of a multi-party system or those critical of Party policies and leadership - including former MPs - have had their applications for adoption rejected; thus equating such acts as acts 'inimical to the interests of the State'.

In Tanzania the National Executive Committee of the CCM acts

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| 1. Zambia: | Constitution of Zambia Act, 1973, Art. 73(3) as amended by the Constitution of Zambia (Amendment) Act, 1983, No. 1, Art. 75(3). |
| 2. UNIP: | Constitution, 1988, Art. 85(2) (a) to (i). |
| 3. Zambia: | Electoral (Amendment) Act, 1983, No. 2, sec. 5. |
| 4. | <u>Supra</u> , p. 247. |

under the provisions of the CCM constitution which provides that

At the time of election, the National Executive Committee shall do the following: It shall consider and make final nomination of names of candidates for election to Parliament.¹

The principle behind primary elections and the vetting of candidates by the Central Committee in case of UNIP or the National Executive Committee in case of CCM, is the same, namely to create an opportunity for local and/or national party leaders to encourage persons of their liking and political orientation to stand in the primaries or for the national assembly with a guarantee of easy passage. The most unfavoured candidate (by the party) might not necessarily be the most unpopular person in the constituency. In Zambia of the successful candidates at the first primary election held on 1st November, 1973, 26 were disqualified by the Central Committee.² These disqualified candidates were considered 'undesirable' mainly because they were suspected of leanings with proscribed political parties. In 1978 the Central Committee vetted 30 of the 348 candidates selected by the Party through the primary election system. In 1983 General Election in which there was no primary election, the number of seats allocated to each Province, number of approved and disapproved candidatures and the number of old and new members of Parliament, were as shown in the following Table:

TABLE D: 1983 National Assembly General Election Result.³

Province	Seats	Vetted	Approved	New MPs	Old MPs	Total MPs
Central	11	1	73	4	7	11
Copperbelt	19	16	138	10	9	19
Eastern	16	2	104	9	7	16
Luapula	12	4	64	7	5	12
Lusaka	8	4	51	6	2	8
Northern	18	12	138	9	9	18
North-Western	10	1	45	9	1	10
Southern	16	3	88	8	8	16
Western	15	4	84	7	8	15
9	125	47	781	69	56	125

1. Tanzania: CCM constitution, Art. 61(6) op. cit.

2. Legum, C. (Ed.) Africa Contemporary Record; Annual Survey and Documents 1973-74, London, B329-30.

3. Zambia: Compiled from figures in Presidential and Parliamentary Elections Results, 1983; Elections Office, Lusaka, 1983.

In 1983, 828 persons applied for approval to stand for election to the National Assembly. The Central Committee approved the candidature of 781 and disapproved of 47 persons. In 1988 the Committee of Chairmen approved 609 of the 747 prospective candidates; thus vetting 138 persons.¹ Among the vetted applicants were seven former MPs and a former Zambian ambassador. Supporters of one of the vetted applicants marched to the DG's office in Kitwe on the Copperbelt, to protest against his disapproval.² The number of persons vetted in the 1988 Parliamentary election shows that the Party is increasingly becoming a subject of public criticism and the Party leadership was in turn becoming sensitive to such criticism. Most of the people who become victims of vetting are those intelligence reports reveal (correctly or wrongly) to be critical of Party policies or leadership. The figures also show that there was a decline in the number of prospective candidates for the National Assembly in the 1988 Parliamentary election from 828 in 1983 to 781 in 1988. The fear of being vetted contributed towards such decline. The march to the DG's office is a new development indicating a deep resentment against the vetting system. The increasing number of persons being disapproved for election to the National Assembly might increase the demand for the abolition of the vetting system, or, a return to a multi-party system.

(c) Voters' Choice of National Assembly Representatives.

Notwithstanding some shortcomings in the electoral system, Zambia has been ruled through the ballot box. The 1962 Legco and 1963 Legislative Assembly elections were held under colonial electoral system. After Independence, one general election was held under a multi-party system in 1968 and four have been held under the One-Party system, namely in 1973, 1978, 1983 and 1988. Although the Committee of Chairmen adopted National Assembly candidates, the Party is expected to remain neutral except organizing election campaign meetings at which the candidates

1. Times of Zambia; 26th September, 1988.

2. Times of Zambia; 28th September, 1988.

seek the support of the voters and Party officials impress it upon the voters that all candidates are approved and acceptable to the Party and that it was the duty of the electors to choose their representatives to the National Assembly. The Party policy is that candidates should be treated equally and should be given equal opportunity to present themselves to the electorate. Thus, private canvassing, production of personal campaign posters, information, name cards and financial expenditure in the electioneering, are forbidden.¹

The One-Party system, unlike the multi-party system in which the Party candidate and constituency were selected by the Party, encourages 'home standing', that is, candidates tend to stand in their tribal constituencies, and, in urban areas, in the constituencies with a concentration of their ethnic people. That has in some cases resulted in the election campaigns degenerating into personal or family conflict or feud unheard of during the 1962, 1963 and 1968 general elections held under a multi-party system. Although the Party tries to ensure that candidates adhere to fair practices in their election campaigns to allow the one-party electoral system to operate equitably, the candidates' attitudes in most cases are full of tricks revealing a spirit of 'each man for himself and UNIP for us all'.

The abolition of primary elections,² on the eve of the 1983 Parliamentary election, has removed the restriction on the number of candidates per constituency that the Chairmen of Committees may approve. Since elections in a One-Party system are not held as a means of appealing to the electorate for a mandate to solve specific social, economic or political problems, but merely representative selection, it could be said that it does not really matter how many people contested or

1. UNIP: Constitution, 1988, 85(2).

2. Zambia: Constitution of Zambia Act, 1973, Art. 75(4) as amended by the Constitution of Zambia (Amendment) Act, 1983, No. 1, Art. 4.

stood as candidates per constituency. The number of candidates standing in each constituency in the first non-primary election General Election was quite high as the following Table shows:

TABLE E: Candidates per Constituency in 1983 Parliamentary Election.¹

Candidates:	1	2	3	4-5	6-10	11-15	16-18
Constituencies:	0	9	16	41	50	5	4

This Table shows that all the seats were contested: the minimum number of candidates per constituency being two and the maximum number being eighteen candidates. The constituencies with the largest number of candidates were Kabwe (18), Roan (16) Chipangali and Mporokoso (15) candidates each. Chipangali is a rural constituency while the other three are urban constituencies. The above figures show that the voters are presented with a wide range of candidates - although not of policies - from which to choose their favourite candidate. To assist the voters assess the candidates, each candidate is required to address campaign meetings organized by the Party and to speak on a number of subjects chosen by the Party and these include Humanism, national unity, crime in the constituency, self-reliance, the meaning of the patriotic song Tiyende pamodzi ndi mtima umodzi ('moving forward in national unity') and the national motto of 'One Zambia, One Nation'. Although candidates are required to refer to problems in their constituencies, major issues such as unemployment, lack of places in schools, annual austerity ('tighten-your-belts') measures and foreign debt which might be considered by some candidates as worth discussing, are excluded from the list of topics candidates are required to speak upon.

There are probably two reasons why candidates are assigned what are prima facie elementary subjects; first, the electorate itself is

1. Zambia:

Compiled from figures contained in the
Presidential and Parliamentary Election Results;
op. cit., pp. 1 - 51.

composed mainly of less educated voters who probably would not follow or be interested in speeches on e.g. Zambia's international debt. Secondly, the less elementary subjects such as unemployment, industrial or foreign relations would probably lead into criticism of the Party and its Government and turn election campaigns into controversial meetings at which Party policies and leadership might be open to public criticism. Accordingly, to ensure that candidates confine themselves to the selected subjects, Party election guide-lines provide, inter alia, that

The election itself should focus on the issues which concern you and the nation and not on personalities. It must be based on the desire to bring together all our communities instead of dividing them; it must be used to integrate rather than fragment, to build the nation instead of dividing the people.¹

The guide-lines highlight the philosophy behind election under a One-Party participatory democracy: elections are not intended to effect an upheaval of the social order but to harness the existing social forces in the society and consolidate the political system. Viewed from a two-party or a multi-party system angle, it could be said that elections have no meaningful role in a contemporary African one-party system since they do not, and are not intended to, solve any social problems. To the people concerned, the elections are seen as exercises in the choice of their representatives in the National Assembly. The system does enable the people to freely elect their representatives.

The Franchise.

Every Zambian national is entitled to register as a voter if he or she is above the age of eighteen years² and not otherwise disqualified. In the 1962, 1963 and 1968 general elections held during a multi-party system,³

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| 1. UNIP: | Presidential and National Assembly Regulations, 1983, Reg. 4. |
| 2. Zambia: | Constitution of Zambia Act, 1973, Art. 72. |
| 3. | For the Legco, the Legislative Assembly and the National Assembly, respectively. |

party contest encouraged voting. The first one-party State general election witnessed a drop in voting almost to confirm the contention that African political parties soon after independence have tended to decline in both influence and organizational ability.¹ The decline was more of a reaction to the introduction of the one-party system than a decline in the organizational ability of UNIP. The following Table shows that the number of voters has been rising but the number of persons not registering as voters and of those registered as voters who do not participate in voting, is correspondingly high. The number of voters registered at each general election is about half of the adult population. The majority of the voters are not members of the Party.

TABLE F: National Assembly Election Voters' Participation 1968-1983.²

Year	Electorate	Valid Votes	Invalid Votes	Not Voting
1968	1,587,916	1,079,922	63,490	444,504
1973	1,736,107	581,249	34,464	1,120,394
1978	1,971,883	1,194,989	77,392	699,502
1983	2,377,610	1,572,333	104,834	700,443

When registration of voters closed on the 14th November, 1987, for the 1988 Presidential and Parliamentary General Elections (October) 3.3 million persons had registered as voters.³ The British electoral system based on the single-member constituency and a single-majority election - 'first past the post'⁴ - favours a two-party rather than a multi-party system. The result, however, is the same as

1. LaPalombara, J., and Weiner, M., Political Parties and Political Development; Princeton, 1966, p. 207.

2. Zambia: Compiled from figure contained in Presidential and Parliamentary Election Results, 1983; op. cit., Appendix B (a) and UNIP; Presidential and Parliamentary Election Results, 1978; Section D.

3. Times of Zambia; Tuesday, 24th November, 1987: "3m Registered: Votes Drive Pays off", p. 1.

4. de Smith, S.A., Constitutional and Administrative Law; Fifth ed., 1985, Penguin Books, p. 260.

in an election under a one-party system in that the candidate with the majority of the votes cast, is declared the winner notwithstanding the fact that the electorate in his constituency might have voted against him. For instance, in the Kabwe constituency which had eighteen candidates, the winner polled 6,226 votes while the other seventeen candidates together received 17,824 out of the 24,050 valid votes cast. The Western assertion, however, is generally that a one-party system is not a democratic system because democracies are characterized by the presence of a two or a multi-party system: "political parties created democracy and modern democracy is unthinkable save in terms of the parties".¹ In the same context, it has been stated that "democracies universally are characterized by the institution of political parties"² to mobilize the people. In a similar bluntness, it has been said that "Every democratic state has at least two political parties, its party system - the integral part of its institutional structure."³ The multi-party system is, therefore, seen as the touch-stone of a democratic system, the "litmus paper test for the presence or absence of democracy in a country."⁴

According to these views, the one-party system in practice in such countries as Tanzania and Zambia is and cannot be the basis of a party system or a democratic government or the presence of a democracy; ipso facto, the system of government pursued in the Union of South Africa would qualify as a 'democracy' and its electoral system as a 'party system' since it is based on a multi-party system. If democracy meant a 'government of the people by the people' quaere whether a system as that pursued in Zambia which allows eighteen candidates to contest a

1. Schattschneider, E.E., Party Government; Holt, N.Y., 1942, p. 1.

2. Pennock, J.R., Democratic Political Theory; Princeton, 1979, p. 275.

3. Casselini, C.W., The Politics of Freedom: An Analysis of the Modern Democratic State; Washington UP, Seattle, 1961, p. 20.

4. Dahl, R.A., Pluralist Democracy in the United States; Rand McNally, Chicago, 1967, p. 203.

single Parliamentary seat would be described as 'undemocratic' because the contest were not carried out by different contestants belonging to eighteen different parties.

The great majority of countries in the world call themselves democracies. These democracies range from systems which evolved over hundreds of years to those created out of the territorial re-adjustments after the Second World War and the demise of European colonial empires in Asia, Africa and other places. These democracies range from systems where very little is written and much is implied, to those where human rights and freedoms are clearly stated in a document, such as the USA and Zambia. These democracies range from countries where there are strong liberal traditions of tolerance to those where the power of the state is exercised in such an autocratic way verging on personal rule. In ancient Greece where politics were born and flourished in the small city states, 'democracy' meant government by the people: direct democracy where everyone was required to participate in the process of government.

In modern times, 'democracy' has become synonymous with 'constitutionalism', that is, a political system where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize and campaign in between as well as immediately before elections with a view to presenting themselves as alternative governments, and, there should be effective civil liberties enforceable by an independent judiciary. That is not a definition of a 'democracy' but a description of a particular system of government, e.g. that of the UK or the USA.

Under the One-Party system the electoral arrangements have been designed to allow candidates, albeit from the same party, who aspire to be elected to the National Assembly, to be selected by the

people on the assumption of their capabilities as potential members of the Assembly. That arrangement differs from the previous system under the multi-party where in a constituency parties could put up only one candidate and the contest was basically between the political parties and not the contestants. Under a one-party system voters have a wider range of candidates to choose from than under a multi-party system. An electoral system is a devise for consensual mobilization of the population designed to achieve national stability and integration and the ultimate legitimization of the system of government of a state; it encourages the people to believe that they live in a democracy and gives them a strong impression that they are in charge of their own affairs. Electoral devices enable the unscrupulous politicians to manipulate the power of the state while hiding behind a smokescreen of legitimacy and respectability.

The practical successor to direct democracy was indirect representative democracy, and this has become the most popular form of self-government to-day. The most obvious forms of representative democracy in Africa to-day are parliamentary systems of government, most of them derivations of French or British models. The One-party system adopted and being tried in a number of countries, including Zambia, is intended to involve the majority of citizens in democratic process notwithstanding the absence of competitive political party activities. The system does eliminate political party thuggery, corruption, intimidation etc.,¹ which were prevalent under a multi-party system tried in most African states in the immediate post-independence era. The One-Party system is, however, a transitional phenomenon; when the environmental constraints caused by ethnic politics changed the political culture, then a sound basis for operating a democratic multi-party system will eventually emerge.

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On corruption in One-Party electoral system, see infra, p. 299 et seq.

Section 2. The Party's Dissatisfaction with the Courts' Handling of Election Petitions.

Although under the one-party system inter-party thuggery and violence has ceased, UNIP is still confronted with the problem of corrupt practices in elections, be they Party or Parliamentary elections. There are two major causes for the Party's failure to control electoral malpractices; first, notwithstanding the achievement of independence and introduction of a one-party system, electoral laws have remained as devised during the colonial era, that is basically English imported electoral law. Secondly, the presence of 'the Party' and 'the Government' each with its own constitution and electoral commission,¹ has resulted in the courts refusing to enforce Party rules designed to combat some electoral malpractices on the ground that Party rules are not 'law' to be enforced by the courts of law.

In the UK by 1868 the electoral law had provided that any dispute relating to election results should be heard by the QBD in the constituency from which the petition arose and before a single judge, who dealt with both law and facts involved in the case and whose decision was final.² After 1879 election petition jurisdiction was vested in two judges who must be in agreement if an election were to be avoided. Initially, courts showed some hesitation at being concerned with a subject so intimately connected with party politics and not everywhere considered appropriate to their jurisdiction. But the experiment vindicated itself when a number of petitions failed, for it was easy to bring a petition on frivolous or vexatious grounds. Stricter observance of the law relative to elections was forced on candidates and their agents.³

1. Zambia: Constitution of Zambia Act, 1973, Art. 73 and Constitution of UNIP, 1988, Reg. 62.

2. Keir, Sir David L., Constitutional History of Modern Britain Since 1485; 9th ed. 1969, 1971 reprint; Adam and Charles Black, p. 467.

3. ibid. p. 467. The law was provided by the Parliamentary Elections and Corrupt Practices Act, 1879, 42 & 43 Vic. c. 75.

Through a number of Ordinances passed by the NR Legco between 1924¹ and 1964, English electoral principles were introduced into the Zambian law. These were mainly electoral principles contained in the Parliamentary Elections and Corrupt Practices Act, 1879 and the Representation of the People Act, 1918² and 1948.³ After Independence these laws were consolidated into the Electoral Act, 1968⁴ which was repealed and replaced by the Electoral Act, 1973⁵ later amended by the Electoral (Amendment) Act, 1983⁶ and the Electoral (Amendment) Act, 1986.⁷ It is pertinent to point out that although the contest is said to be between or among political parties, English law of elections does not assign any role to political parties; the emphasis is on the candidate and his election agent. The candidate is not an agent of the party. Consequently, neither the pre-independence electoral laws nor the Independence Constitution of Zambia attempted to assign any role to political parties, vis-a-vis the conduct of election campaigns.

One other factor contributed to the absence of law assigning any electoral role to political parties. The British colonial administrators in NR viewed the activities of political parties, in particular the African political parties, as dysfunctional to the working of the colonial political system, e.g. through their agitation for an early termination of colonial rule. Accordingly, political parties working at variance with the interests of the colonial regime could not be assigned a role in the constitutional system designed to perpetuate colonial rule. Notwithstanding the introduction of the One-Party system the situation has not changed; the law on electoral malpractices is still as designed during the colonial era and concerned mainly with the candidate and his agent and not with the political party.

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| 1. NR: | Legislative Council Ordinance, 1925, No. 25, Cap. 19, secs. 24 - 31. |
| 2. UK: | 1918, 7 & 8 Geo. 5, c. 64 |
| 3. | 1948, 11 & 12 Geo. 6, c. 65 |
| 4. Zambia: | 1968, No. 24, Cap. 19 |
| 5. | 1973, No. 44 |
| 6. | 1983, No. 2 |
| 7. | 1986, No. 19 |

(a) Electoral Offences.

When the Legco was established in 1924, if the validity of an election was queried by any person qualified either to be elected or to vote at such election, he applied to the Governor to set aside the election result. The Governor, after an inquiry declared the person duly elected or nullified the result.¹ On the other hand, the Governor could refer such a question to a judge of the High Court, who conducted the inquiry and referred his finding to the Governor.² The latter procedure was followed in most cases. The final decision was that of the Governor.

The jurisdiction to hear and determine any question whether any person has been validly elected a member of the National Assembly was later vested in the High Court. An election petition may be presented by a person who lawfully voted or who was a candidate or who had a right to be nominated as a candidate³ or the Attorney-General. The phrase 'a person who had a right to be nominated as a candidate' includes a person whose candidature was vetted by the Committee of Chairmen; it is, however, provided that a person whose candidature is disapproved by the Committee of Chairmen, cannot challenge the decision in a court of law.⁴

The Party cannot present an election petition; consequently its role in preventing electoral offences is weak. The dreaded Committee of Chairmen's vetting exercise takes place before election campaigns are conducted during which period alleged electoral offences, e.g. bribery, are committed by the candidates or their election agents. Vetting of candidates after the campaign - by which time the Committee of Chairmen would have known how each candidate conducted his campaign - would be tantamount to the Committee itself conducting a primary election. Electoral offences are often in the form of corrupt electoral practices or offering

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1. NR: Legislative Council Ordinance, 1925, No. 25, Cap. 19, sec. 34(2)
 2. ibid. sec. 34(4)
 3. Zambia: Electoral Act, 1973, sec. 18(a) to (d)
 4. Electoral (Amendment) Act, 1983, No. 2, sec. 5; supra, p. 289.

or giving of a bribe in exchange for the vote. The Electoral Act, 1973, provides that

The election of a candidate as a member shall be void on any of the following grounds which if proved to the satisfaction of the High Court upon the trial of election petition, that is to say:

- (a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred; and
- (b) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or his election agent or his polling agent.¹

Subsidiary legislation made under the Electoral Act,² provides inter alia, that any person who, directly or indirectly by himself or any other person gives, lends and procures or offers, promises or agrees to give, lend, procure any money to or for any person in order to induce any voter to vote or refrain from voting or who corruptly does any of such act as aforesaid on account of such voter at any election, shall be guilty of the offence of bribery.³ The Constitution of Zambia and the electoral law do not regulate the role of the Party in the conduct of elections beyond the vetting point. The registration of voters and the conduct of elections whenever Parliament is dissolved or bye-elections, is the business of the Electoral Commission appointed by the President under the Constitution of Zambia,⁴ which functions independently of the Party. The Chairman of the Commission, appointed by the President,⁵ has often been a civil servant: Chairman of the Public Service Commission or the

1. Zambia: Electoral Act, 1973, sec. 17(2).
 2. Electoral (General) Regulations, 1983, S.I. No. 78.
 3. ibid. Reg. 59(1).
 4. Constitution of Zambia Act, 1973, Art. 73(3)
 5. ibid. Art. 73(4)

Deputy Chief Justice. Any electoral malpractice committed by a candidate or his agent is not a matter to be considered by the Party or the Electoral Commission, but by the High Court through an election petition. The position, therefore, is unsatisfactory as regards any attempt to prevent electoral corrupt practices. Although as an aspect of the one-party system the Party officials organize election campaign meetings, legally such gatherings are conducted not under the auspices of the Party but under the authority of the Chairman of the Electoral Commission who is responsible for the supervision and conduct of the elections. In fact, immediately the Central Committee¹ releases the names of candidates allowed to lodge their nomination papers, the Director of Elections, who works directly under the Chairman of the Electoral Commission, assumes the actual responsibility for the conduct of both the Presidential and National Assembly elections. This arrangement was devised during the multi-party system under which one of the functions of the Electoral Commission was ensuring that political parties did not interfere in the conduct of elections. Ideally, under a one-party system the role of the Party and the Electoral Commission should be complementary in seeing that fair play thrives and the voters' choice of representatives is freely exercised. This may require some intervention by both bodies in the conduct of candidates during the election campaign period.

Under the present system, however, both the Party and the Electoral Commission adopt a laissez faire attitude towards the conduct of candidates leaving any electoral malpractices to be sorted out by the High Court through election petitions brought by a dissatisfied voter or candidate or the Attorney-General. Where none of these prescribed petitioners act, prima facie corrupt practices and illegal conduct used by a successful candidate go unchallenged.

(b) The High Court and Election Petitions.

Influenced by English law as earlier stated, previously only one judge sat to hear an election petition. However, due to the Party's dissatisfaction with the judiciary's attitude to allegations of electoral malpractices, the number of judges to hear an election petition has been increased to three. There are three main determinations that a High Court can make in an election petition, first, it may declare the election result null and void, second, confirm and decline to avoid the election result, and third, order a recount of votes. An order for a recount of votes is not a relief but it helps to clarify uncertain situations as in the case where there is evidence of discrepancies in the counting of votes, cancellation of figures of votes cast for each of the candidates.¹ A recount, however, might result in the nullification or confirmation of the election result.

The Council for Law Reporting² in Zambia rarely reports election petition cases except on appeal, hence, most of the cases cited in this Chapter on the election petitions were unreported but made available to the writer by the Registrar of the High Court, Lusaka, as part of the field-work in the preparation of this study.

In 1983 of the onehundred and twentyfive constituencies, there were allegations of corrupt electoral practices in thirtyfour constituencies. This is a high incidence of allegation of electoral malpractices compared to Tanzania where in 1980 there were ten petitions arising from an election concerned with a National Assembly of onehundred and eleven elected members.³ In Kenya there were fortythree election petitions in the 1974 General Election.⁴ The nature of the allegations

1. Loongo v. Shepande (1983) ZR 59.

2. Zambia: established under the Council for Law Reporting Art, 1967, No. 57, Cap. 55.

3. Donge, J.K. and Livinga, A.J., "In Defence of the Tanzanian Parliament", P.A., Vol. 39, No. 1, January, 1986, 230 p. 232.

4. Mutungu, O.K., The Legal Aspects of Witchcraft in East Africa with particular Reference to Kenya; East Africa Literature Bureau, Nairobi, 1977, p. 79.

in the petitions in these countries is the same: wealthy candidates obtaining votes through giving of money, beer, essential commodities such as food and building materials etc., on one hand, and, accusations of witchcraft and other natural powers, on the other hand. For instance, in Luywa v. Sianga¹ the petitioner, who polled 462 votes as against the respondent's 3,399 votes, asked the High Court to nullify the respondent's election as the member of the National Assembly for the Sikongo constituency on nine grounds. Among these were that the respondent, who was a minister of state in the out-going administration, had an unfair advantage over him in that he had campaigned using a Government vehicle and flying a ministerial flag, and, that the respondent had distributed blankets and building materials to persons and institutions to induce them to vote for him. He further alleged that for a good measure the respondent had told people that the petitioner was a witch.²

Of interest to the Party in this case was the allegation that contrary to Party rules, some Party officials instead of maintaining neutrality, had assisted the respondent in his election campaign. Party Regulations provided that the organization and conduct of the election campaign in every constituency was under the supervision of the District Governor and his Party district officials,³ who were required to be neutral. Prima facie, there is conflict between this provision and the provision of the Constitution considered earlier to the effect that supervision and conduct of election shall be under the Chairman of the Electoral Commission and his officials, in particular the Director of Elections.⁴ In reality, however, District Governors have the effective control of election campaigns in that there is a District Governor in

1. (1983) ZR HP/EP. 3 (unreported).

2. Kenya: In the 1974 General Election of the 43 election petitions 5 were based on accusation of witchcraft: Mutungu, O.K., op. cit., p. 79.

3. UNIP: 1983 Presidential and National Assembly Regulations, 1983, Reg. 4(5).

4. Supra, p. 302.

each of the fifty-five districts while there is only one Director of Elections and most of his returning officers, mostly school teachers, are appointed ad hoc whose functions are concerned with the conduct of the election poll rather than the election campaigns. The petitioner's contention therefore, was that by soliciting and obtaining the support of the Party officials, the respondent was not only in violation of the Party Regulations, but was by that fact in breach of the 'law'. What were in issue on this point were questions, first, whether the general law for the time-being regulating election assigned the Party any role, and, secondly, whether Regulations of the Party vis-à-vis the conduct of elections, were enforceable by the High Court. The Court's view was expressed as follows:

There is no law that I know of that prohibits anybody campaigning on behalf of a candidate of his choice. The evidence in support of paragraph 3(a) of the petition is by the petitioner and some witnesses. The District Political Secretary campaigned on behalf of the respondent, it is not unlawful to do so. May be it is a breach of Party Regulations but certainly does not amount to a conduct that amounts to misconduct that falls under section 12(a) of the Electoral Act, Paragraph 3(a) is not proved.¹

This decision has the effect of denying the Party any meaningful role in election campaigns and illustrates one of the causes of UNIP's failure to combat electoral malpractices. The Courts cannot enforce Party rules because these are considered not as part of the law of Zambia. On the other hand, UNIP cannot nullify an election result on the ground that the candidate had breached the Party Regulations during the election campaign: a situation which clearly shows that the National Assembly is not a committee of the National Council of the Party; if it were, Party Regulations could apply to the election of its members.

A distinction, however, should be drawn between this decision and what was said in the Supreme Court in Nkumbula and Kapwepwe v. Attorney-General² to the effect that the purpose of the Party promulgating

1. Luywa v. Sianga, op. cit., per Chirwa J., at J(7).

2. (1979) ZR 267.

a constitution to which it is expected that every member of the Party will adhere, must be taken by the law as meaning that if any member of the Party does not adhere to the Constitution, or if the rules as to giving of notice of meeting of the Party or any such other matter are not observed any court is bound to acknowledge that such rules have not been observed. Where the Party were to complain to a court that one of its members had not observed its Constitution or rule the court would be bound to give a decision upholding the Constitution.¹ The distinction lies in the fact that the National Assembly is not an organ of the Party constituted under the Party's constitution and accordingly, Party regulations cannot be applied in Parliamentary elections. The court accordingly found that the matters complained of had taken place before the election campaign and refused to avoid the result.

In Syamujiye v. Munkombwe,² the petitioner made the typical allegations in these election petitions, that the respondent gave money to a voter to induce him to vote for the respondent contrary to sec. 17(2) of the Electoral Act, and, had called him a thief, contrary to Reg. 59 of the Electoral (General) Regulations. The ruling of the court was also typical in these cases, namely that the giving of money did not itself amount to an electoral offence which is committed only where the giving was intended to induce any voter to vote or refrain from voting and that there was no evidence that money was given to induce a voter to vote for the respondent. Accordingly, of the thirtyfour election petitions, thirty were dismissed and in these the court used the language contained in the Electoral Act (Sec. 17) which seems to imply that the decision whether to uphold or avoid an election result

1. Nkumbula and Kapwepwe v. Attorney-General, op. cit., per Gardner, AG-DCJ, at p. 273.

2. (1983) ZR HP/EP. 16.

is at the discretion of the court:

I am not satisfied that any illegal or corrupt practice or misconduct on the part of the respondent has been proved; thus I cannot say that the majority of voters in the constituency were prevented from electing a candidate of their own choice.¹

The effect of bribery and/or corrupt practice in English law of elections is basically that proof of bribery should not be so stringent. Due proof of a single act of bribery or with the knowledge and consent of the candidate or his agent, however insignificant that act might be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuses, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agents.² The position is different when it comes to mere irregularities: a court hearing an election petition if it found that irregularities occurred during an election campaign, it might determine that the result ought to stand since they were unlikely to have affected the result: "There are other reasons, including the maxim that dog does not bite dog."³

The Zambian judges' attitude in election petition cases in 1983 resembled that of the judges in England in the 1880's who were reluctant to get involved in election petition matters which they perceived as political controversies and thus outside their judicial function. In the Zambian cases no distinction was drawn between claims of irregularities and allegations of corruption and bribery. In some cases the court simply declined to avoid the election result, for instance, in Chilekwa v. Matanda,⁴ where the petitioner proved to the satisfaction of the court that corrupt practices had been committed

1. W.H. Banda v. M. Chulu (1983) ZR HP/EP. 29 (unreported), per Mumba, J., at per p. J. (19).

2. Halsbury's Laws of England; Vol. 15, 4th ed. p. 245 par. 780.

3. de Smith, S.A., Constitutional and Administrative Law; op. cit., p. 272.

4. (1983) ZR HP/EP. 31 (unreported).

by the respondent's agents, the court refused to nullify the result on the ground that the petitioner had not established the agency between the respondent and the perpetrators of the illegal activities. Of the remaining four election petition cases, a recount was ordered in two and the other two cases were declared null and void on ground of corrupt practices, bribery. In one of these latter cases, that of Chileshe v. Mpundu,¹ concerned the Roan constituency which had sixteen candidates. The respondent had won the seat with 3,063 votes and the petitioner was second with 2,946 votes. The petitioner alleged that the respondent had given voters free beer, food at his restuarant and other commodities and money to induce them to vote for him. On the day of the election, the respondent was alleged to have transported some voters to the polling stations and while there, his agents had made some of the voters to produce 'goat noise', the goat being his election symbol.² The court held, nullifying the result, that

Looking at the facts of this case and in the light of this law, there is no doubt in my mind that it has been established that treating and corruption took place and the person who perpetrated them was Mpundu (the Respondent) by himself and by his agents. Having said this, my decision is that there was no election in Roan Constituency. What was there were business deals between voters and Mpundu to sell the seat to him. A Parliamentary seat is not for sale. It cannot therefore, be a subject of the apparent auction that was conducted in Roan Constituency. That election is therefore null and void.³

The success or failure of the one-party system in Zambia will, to a great extent, depend on the success or failure of the electoral system adopted in Party and State elections. The abolition of the primary elections in Parliamentary election was a move in the correct direction, however, it has resulted in the inflation in the candidature:

1. (1983) HP/EP. 11 (unreported), per High Court Commissioner Kabamba, at p. J. (35). Brackets supplied.
2. Zambia: To assist illiterate voters candidates are assigned electoral symbols such as a bicycle, chicken, hoe, hut or goat.
3. loc. cit., per Kabamba, High Court Commissioner, at p. J. (35); brackets supplied.

more candidates chasing few votes; consequently, the scrumble for the votes was bound to result in bribery and corruption. UNIP's leadership viewed the courts' refusal to nullify most of the election results queried in the election petitions, as a move that might encourage corrupt practices in National Assembly elections. The Party was of the view that one of reasons why the High Court did not upset most of the election results, was that there was no appeal against a decision of the court in election petition. Appeals were allowed with the leave of the Supreme Court in so far as they involved any question as to the interpretation of the Constitution.¹ Appeals against High Court decisions in election petitions are restricted in many jurisdictions, for instance, in Malawi the determination by the High Court of an election petition is not subject to an appeal.²

In Zambia the Party demanded that there should be changes in the law. Consequently, the Electoral Act, 1973, which is the principal Act on election matters, was amended to provide that an appeal shall lie to the Supreme Court on a point of law or mixed law and fact from any judgement or order of the High Court in election petition matters.³ A further amendment provided that an election petition "shall be tried in an open court by a High Court of three puisne judges".⁴ There was merit in the law which restricted appeals in election petitions. An appeal in any matter takes time to be heard and settled. It is possible that an election result might be nullified after a person had sat in Parliament and had received a salary and allowances as an MP for over a year. It was, therefore, essential to quickly settle election disputes once and for all. With the increase in the number of judges and availability of appeals, the High Court is expected to

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| 1. Zambia: | Constitution of Zambia Act, Art. 77(3). |
| 2. Malawi: | Constitution of Malawi Act, 1966, No. 23, Art. 32(3). |
| 3. Zambia: | Electoral (Amendment) Act, 1983, No. 2, inserting a new sec. 29A(1) in the Principal Act. |
| 4. | Electoral (Amendment) Act, 1986, No. 19, amending sec. 26(2) of the Principal Act; the underlined being the amending words. |

play a more responsive role in ensuring that allegations of corrupt practices in elections are closely scrutinized. The increased number of judges and the right of appeal to the Supreme Court will not deter most candidates from engaging in corrupt electoral practices since it is assumed that under the competitive one-party system of unlimited number of candidates per constituency, the chances of winning a seat without financial or material inducement to some of the voters, is near impossible. The electorate is now expecting candidates to give out inceptives in exchange for votes. Consequently, in most election petition cases there is ample evidence before the Court showing that even the petitioners engaged in corrupt electoral practices. Although the Courts are concerned with the allegations against the respondent, it is natural that they are bound to be reluctant to nullify an election result where it is obvious that the petitioner came to court 'without clean hands'. Some petitioners admit in court of having committed worse acts of corrupt electoral practices than the respondent. There are bad cases in which the Party should otherwise be the petitioner.

According to John Stuart Mill, "Political institutions are the work of men; owe their origins and their whole existence to human will. Men did not wake on a summer morning and find them sprung up. Neither do they resemble trees, which, while planted, 'are aye growing,' while men 'are sleeping'. In every stage of their existence they are made what they are by voluntary human agency."¹ Of all the areas of the role of UNIP, the institution of elections fits well with this truism. If election results are to be respected, the Party would have to mount an extensive campaign in each election year against corrupt electoral practices. The elimination of electoral malpractices should not be left to be sorted out by the Courts: for prevention is better than cure.

1. Mill, J.S., Representative Government; 1st ed. 1865, p. 4

Section 3. The Role of the One-Party Parliament.

The hypothesis is that compared with the Westminster model of Parliament, the role of Parliament in a One-Party seems receding. The enactment of laws is still vested in the legislature consisting of the President and the National Assembly.¹ In Tanzania it was once said that "This Parliament belongs to TANU. That the Parliament is supreme is a colonial way of behaving In a One-Party democracy the party is supreme all the way."² That view was based on the Tanzanian principle that the National Assembly is a committee of the National Conference of CCM.³ In Zambia the National Assembly can reject a Government bill or pass a vote of no confidence in the Government notwithstanding the provisions of Art. 8 of the Constitution of the Party. The Party, however, might not stand aloof in the face of such insubordination by the National Assembly irrespective as to whether the rejected Bill or the cause of the vote of no confidence concerned an important matter or not.

A member of the National Assembly has a dual status, that of a member of the Party and a member of Parliament. Membership of the House is dependent on the membership of the Party,⁴ and that entails acceptance and upholding of the objectives of the Party. By voting against a Government Bill, or, supporting a motion of no confidence in the Government, a member might be exposing himself to being vetted by the Committee of Chairmen in the next parliamentary election.⁵ The fear of being vetted plays havoc on the

1. Zambia: Constitution of Zambia Act, 1973, Art. 63.

2. Tanzania: Second Vice-President, Rashid Kawawa, speaking on a debate on Tanzania's recognition of secessionist State of Biafra: Parliamentary Debates, 19th June, 1968, Col. 2534.

3. Art. 59(11) Chama Cha Mapinduzi Constitution, 1977, now Na 57(11) Katiba ya Chama Cha Mapinduzi, 1984. (art. 57(11) Constitution of Chama Cha Mapinduzi, 1984).

4. Zambia: Constitution of Zambia Act, 1973, Art. 67(c).

5. Supra, p. 286.

mind of some of the members of Parliament and operates as a psychological warfare between the National Assembly and the Party. It is, however, important to point out that although by voting against a Government Bill an MP might thereby be disobeying a Party directive or rule and thus in breach of the Party's disciplinary Rules, members of the National Assembly are protected by law against disciplinary action by any person or body of persons for what they might have said or done in the National Assembly. Hence, all the Party can do against those MPs considered critical of the Party, is vetting them and thereby stopping them from returning to the House. Conduct in the National Assembly is included among acts considered 'inimical to the interests of the State' by the Central Committee in its vetting exercise. This development inhibits free speech in the House.

(a) Security of Membership of the National Assembly.

The principle that loss of party membership should result in loss of a Parliamentary seat, was introduced in Zambia two years after Independence, that is during the multi-party system.¹ All that was required then was that the leader of the political party whose membership had ceased informed the Speaker of that fact. Such an allegation was investigated by a tribunal upon whose report the Speaker based his action: if the allegation was proved to be true, the seat was declared vacant and a bye-election was ordered.² In Nigeria before an election certain political parties used to obtain from the candidates standing on their tickets, a signed but undated resignation letter from the Party and House of Representatives which, immediately the person resigned from the Party or was expelled from the Party, the resignation letter would be dated by the party and sent to

1. Zambia: Constitution of Zambia (Amendment) (No. 2) Act, 1966, No. 47, sec. 3(4) inserting a new sec. 65(4) in the Zambia Independence Order, 1964.

2. The People v. The Speaker of the National Assembly, ex parte H.M. Nkumbula (1970) ZR 97, in which a seat won on ANC ticket was declared vacant after the MP had resigned from the ANC to join UNIP.

the Speaker of the House of Representatives.¹ There were two main reasons why political parties wanted a former member vacate a seat in the National Assembly, first, the seat was regarded as belonging not to the member, but the party, and, second, parties did not want to lose their strength in the House through their former members swelling up the membership of the opposition party. Under a One-Party system the seat belongs neither to the party nor to the member: the latter is merely an incumbent during the life of that Parliament. His membership of the House per se is not of immediate consequence to the Party vis-à-vis the party's ability to remain in power and forming the Government of the day. Ideally, under a one-party system the party should not resort to such severe method of punishing critical members of the National Assembly such as expulsion from the membership of the party.

In Zambia there was one case of expulsion from the membership of UNIP and consequently from the National Assembly during the 1983-1988 Parliament. In 1984 a member of the National Assembly while in the bar of the National Assembly Motel in Lusaka (where members of the National Assembly stay while attending Parliament), denounced the Speaker and other top Party leaders. The member was formally charged by the Appointments and Disciplinary sub-Committee of the Central Committee, which exercises disciplinary jurisdiction over MPs.² The Constitution of the Party provides that offences against the Party include

- (c) acting in a manner likely to bring the name of the Party into ridicule or contempt or disregard;
- (e) being in a state of drunkenness at a Party meeting, in case of an ordinary member of the Party, or in the case of an official of the Party, being in a state of drunkenness at any time.³

1. Obi v. Waziri (1961) All NLR 371

2. UNIP: Constitution, 1978, Art. 55F and Reg. 37(a) (i) to (iv)

3. ibid. Reg. 32(c) and (e), now Constitution, 1988, Art. 64(3)F (d) and Reg. 15(1).

A member of the National Assembly is deemed to be an official of the Party, accordingly, having been given an opportunity to exculpate himself and appeared before the sub-Committee, he was found guilty and the sub-Committee having considered his offence serious, ordered his immediate expulsion from the membership of the Party.¹ The Speaker having been informed of the expulsion, declared the member's seat vacant and ordered a bye-election to be held to fill the vacancy.

The Constitution of Zambia provides that a member of the National Assembly shall vacate his seat in the Assembly, inter alia, if he ceases to be a member of the Party.² A person whose membership of the Party has been terminated (now by the Central Committee³) may appeal to the Committee of Chairmen⁴ and thencefrom to the National Council's ad hoc Appeals Committee whose decision is final.⁵ Since the National Council's ad hoc Appeals Committee exercises quasi-judicial role, an 'appeal' in the form of judicial review of the Committee's decision, should lie to the High Court.⁶ Although a member is given an opportunity to exculpate himself and appear before the disciplinary organ, that does not adequately meet the needs of natural justice in that the proceedings are held in secrecy and the accused member is not afforded legal representation. The secret hearing shields any shortcomings in the disciplinary proceedings from publicity. Consequently, it would be difficult in any case for members of the public to tell whether the facts of the case warranted an expulsion of a person from the membership of the Party with the subsequent loss of his membership of the National Assembly; a matter of national importance. It is important

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1. UNIP: Constitution, 1978, Art. 20(g) and Reg. 33(1) (iv) (f).
 2. Zambia: Constitution of Zambia Act, 1973, Art. 71(2) (b).
 3. UNIP: Constitution, 1988, Art. 59(h)
 4. ibid. Art. 63(1) (n).
 5. ibid. Reg. 18.
 6. Supra, p. 251 et seq.

to note that expulsion from the membership of the Party is the most severe sanction that the Party can impose; there is, however, no laid down rules and procedures on how the Party chooses which sanction to impose. The Party Constitution merely provides that each disciplinary organ at the Section, Branch, Ward, District, Provincial and national level shall impose any of the prescribed sanctions which rang from oral warning or caution, written reprimand, suspension from office to expulsion from the membership of the Party.¹ What sanction is applied is at the discretion of the Party organ and it all depends on the seriousness of the error or offence committed by the member.

(b) The 'Supremacy' of the One-Party Parliament.

Notwithstanding the establishment of a One-Party system, the Parliament of Zambia is designed on the Westminster pattern vis-à-vis its legislative powers and procedures. But as it was once observed that "constitutions are easily copied, temperaments are not; and if it should happen that the borrowed constitution and the native temperaments fail to correspond, the misfit may have serious results."² A One-Party State's Parliament is not to the Party's dictates or controls. Once constituted, the National Assembly falls under the control of the Speaker, elected by the members of the National Assembly from among persons qualified to be elected as members of Parliament who are not members of the National Assembly.³ The role of the National Assembly is regulated by the provisions of the Constitution of Zambia and its own Standing Orders which regulate the frequency of legislative sittings, conduct of debate, number of stages in the reading of bills, motions, budget, adjournments, divisions and the composition of Committees of the House.⁴ The 'supremacy of Parliament' and the role of UNIP under the One-Party system in

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1. UNIP: Constitution, 1988, Arts. 21 and 22, Regs. 10 to 24.
 2. Bagehot, W., The English Constitution; Oxford, 1933, introduction by the Earl of Balfour, p. xxii.
 3. Zambia: Constitution of Zambia Act, 1973, Art. 69(1)
 4. ibid. Arts. 79 to 94 inclusive.

Zambia could be considered in two ways, first, the independent role of Parliament in carrying out its functions, and/or, the role of Parliament as an organ of the Party.

(i) Parliament as an Independent Institution.

In countries with written Constitutions such as Zambia has, the Constitution is the supreme law, any other laws are made subject to the provisions of the Constitution. Parliament is said to be 'supreme' in the sense that it can legislate on any matter without challenge from any other legislative body within the jurisdiction. The political notion of the ultimate sovereignty of the electorate is distinguished from the legal doctrine of the legislative supremacy of Parliament: the courts owe their allegiance to the latter and take no notice of the will of the electors (or political parties). Parliament's supremacy to legislate on any matter is, however, limited in some ways, for instance, it cannot legislate laws that are fundamentally contrary to the wishes of the people concerned or laws intended to control the manner and form of future legislation, or laws that are contrary to the provisions of the Constitution unless such legislation has been passed in accordance with the procedure as laid in the Constitution. Thus, in Mumba v. The People,¹ the applicant was charged with corrupt practice by a public officer, contrary to sec. 25(1) of the Corrupt Practices Act, 1980² which provided that "An accused person charged with an offence under Part IV shall not, in his defence be allowed to make an unsworn statement, but may give evidence on oath or affirmation from the witness box."³

This provision was contrary to the provision of the Constitution which required that "No person who is tried for a criminal offence shall be compelled to give evidence at the trial".⁴

1. (1984) ZR 38

2. Zambia: 1980, No. 14

3. ibid. sec. 53(1).

4. Constitution of Zambia Act, 1973, Art. 20(7);
supra, p. 250 and infra, p. 422.

Parliament had legislative power to enact both the Constitution of Zambia, 1973 and the Corrupt Practices Act, 1980; under ordinary interpretation of statutes one would contend that the latest Act impliedly amended or repealed the old Act but there is no implied amendment of the Constitution. The Constitution is sacrosanct and cannot be amended by implication.¹ In Zambia the amendment of the Constitution is carried through special constitutional amendment procedure² and every Bill intended to effect amendment to the Constitution should be accompanied by a certificate signed by the Speaker or Deputy Speaker when presented to the President for assent confirming that the Bill was passed by the National Assembly in accordance with the provisions of the Constitution.³ Since the provisions of the Corrupt Practices Act were not passed as special provisions intended to effect amendment to the provisions of the Constitution, the court held that there can be no implied amendment of the Constitution, and, accordingly, the accused person charged under the Act could not be compelled to give evidence on oath if he elected to make an unsworn statement. This decision does not mean that Parliament is not 'supreme' because the courts can declare its enactment contrary to the a provision of the Constitution and to that extent of no effect. The courts interpret what Parliament has enacted; it is up to the legislature to change the law it enacted.

The Corrupt Practices Act, 1980 is one of those laws enacted by Parliament as a result of pressure from members of the public and resolutions of the National Council of the Party that law should be passed to curb corruption in public office. Notwithstanding that fact, Parliament alone acting independent of the public and the Party has the

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1. Bribery Commissioner v. Ranasinghe /1964/ 2 All ER 785, see judgement of Lord Pearce at p. 790.
 2. Zambia: Constitution of Zambia Act, 1973, Art. 80 in particular and Arts. 20(7) and (12), 26 and 29(3) in general.
 3. Acts of Parliament Act, 1964, Cap. 16, secs. 5(3) and (4) and 9(c).

legislative power to amend the Corrupt Practices Act or the Constitution. Parliament as a matter of law, can repeal Art.4 of the Constitution and abolish the One-Party system in Zambia. There is no provision in the Constitution or in any other legislation which makes Parliament an official rubber stamp of Party policy or show that the role of Parliament is moulded so as in part to diminish its distinct features or of depriving it of its legislative powers.

The absence of the opposition does not deprive Parliament of its legislative faculties; opposition party or parties do not play a legislative role in the enactment of Bills. The role of opposition is that of criticising Government measures. Opposition at Westminster is neither created nor sustained by statute. Government in the UK is possible without opposition; opposition is simply one of many conventions and usages that have grown up and around the British Constitution. In Zambia, by requiring that political parties register with the Registrar of Societies under the Societies Act, opposition was institutionalized by law and hence its demise could only be achieved through law; Art. 4 of the Constitution of Zambia Act, 1973. Notwithstanding its close links with the Party, Parliament has the legal basis to assert itself and act independently of the Party. Some form of independence - and tension - is essential between the Party and Parliament to safeguard the interests of the nation as a whole from the citadel of the supremacy of the Party.

(ii) Parliament as an Organ of the Party.

Although the Constitution of UNIP requires that every person seeking election to the National Assembly should be a member of the Party,¹ it does not designate the National Assembly as an organ of the Party. The National Council does not initiate legislative measures as such, it merely resolves on policy matters. The statement of the President should be understood in that context or sense when, commenting on the role of MPs,

said that as Party members, members of the National Assembly should at all times observe Party rules and defend Party policies, and that

If the National Council decides that certain action has got to be taken by the Central Committee or by the Government, in order to implement a given policy programme, that has got to be done. If it is legislative action that is needed to implement a policy decision of the Council, the National Assembly, as an arm of the Party, must act accordingly, without question.¹

The reason given why members of the National Assembly should act - without question - according to the dictates of the National Council, is that the "policies and decisions made by the National Council are expressions of the people's will - they are the wishes of the majority and therefore they should be respected".² In reality, however, it is the National Assembly, composed of the elected representatives of the people and not the National Council, which is composed of mostly Party functionaries, that expresses the will of the majority of the people of Zambia. The above statements might give the impression that the National Council is the originator of 'legislative proposals' which are thoroughly discussed by the members of the Council before they are sent to be enacted into law by the National Assembly. If that were the case, it would be proper to assume that all members of the National Assembly being members of the National Council, having had an opportunity to express their views on any such 'legislative proposals', should, when such measures come before the National Assembly, simply endorse and support them.

One of the reasons why backbenchers criticise legislative measures introduced in the National Assembly is not because they purport to show their 'independence' but because in reality the National Council is not the originator of legislative proposals. For instance, the

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1. Zambia: The 'Watershed' Speech, by His Excellency the President, Dr K.D. Kaunda, 30th June-3rd July, 1975, p. 23. Government Printer, Lusaka.
2. ibid. p. 23.

backbenchers' vote against the Local Administration Bill, 1980, was to some extent due to the fact that that measure had not been introduced and discussed at the National Council. Following that defeat President Kaunda pleaded with MPs at the National Council to support the Bill when re-submitted. It was only then that the Bill went through. In most cases the National Council, as a political forum, discusses matters in general terms; its resolutions are not in the form of legislative proposals. It is left to the Central Committee, now the Committee of Chairmen in particular, to decide which resolutions of the National Council should be backed by legislation. The Government implements Party decisions.

Unlike the Party Congress whose convenor is the Committee of Chairmen,¹ the National Council can be convened by the President,² who is responsible for its agenda,³ and chairmanship.⁴ The National Council is, therefore, an effective organ of the President. Changes in Party and Government leadership announced at the National Council are matters confined to the President alone. In the formulation of Party policies before they are presented to the National Council, the President, through his chairmanship of the Central Committee, has great influence in their content and orientation. On the face of it, the President plays an influential role in the determination of matters that come before the National Council and the National Assembly. The President is a component part of Parliament.⁵ This dominant role of the President creates an intolerable situation in which no organ of the Party or Government dare criticise or oppose any policy 'of the Party'. Hence the boycott of the 10th Party Congress held in August, 1988, by the Speaker of the National

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| 1. UNIP: | Constitution, 1988, Art. 50(2) |
| 2. | <u>ibid.</u> Art. 54(2) |
| 3. | <u>ibid.</u> Art. 74(d) |
| 4. | <u>ibid.</u> Art. 74(b) |
| 5. Zambia: | Constitution, 1973, Art. 63 |

Assembly, who, incidentally, was often 'in attendance' at Central Committee and National Council meetings. The protest was against the re-statement that the National Assembly was an arm of the Party.¹ The controversial provision states that

It is hereby declared that no Act of Parliament, regulation, rule, or by-law shall be enacted or passed by any State organ which is in conflict with this Constitution or the National Policies of the Party.²

Under a multi-party system Parliament is a forum for working out of diverse interests, to the end that the laws which emerge therefrom are expected to reflect the power relationships of various interests represented in the House although in the final analysis they embody the political aims and objects of the ruling party. Under both the One-Party and multi-party systems Bills are prepared in secret. Cabinet debates the Cabinet Memorandum setting out the policy behind the introduction of the Bill. In practice legislative proposals emerge from Government ministries and departments. Only when the Bill is ready and published, do members of the National Assembly (and the public) come to see it. In practice, therefore, there is no possibility of Parliament passing a Bill that the Central Committee or Cabinet, presided over by the President, would be ignorant of. The above provision, therefore, is intended merely to assert the 'supremacy of the Party'. That provision cannot override a validly enacted Act of the Parliament of Zambia. To that, it is another scare-crow; there to frighten or terrorise members of Parliament.³

A glance at the range of Acts passed by Parliament each year shows that most of them are not implementation by Parliament of, or,

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1. "When the Soldiers Come Marching In", Africa Events, Vol. 4, No. 10, October, 1988, p. 8. The Speaker, Robinson Nabulyato was retired and Mufwanyanga Mulikita elected the Speaker for the Parliament of 1988-1993.
 2. UNIP: Constitution, 1988, Art. 8.
 3. ibid., the view that this provision purports to spell out the 'Zambian grundnorm', see supra, p. 188.

on any matter discussed at the National Council. The view that it is "most unprincipled and undemocratic for a Member of Parliament who has had the chance to discuss Party policy in the National Council to somersault in the National Assembly and begin condemning a collective decision to which he was a party",¹ applies to a minority of bills that are presented to Parliament. The policies contained in a majority of Bills are discussed in Central Committee and Cabinet and are made known to backbenchers when bills are made public. The structure and procedures are as a result of the decisions of the 4th and 6th National Councils which called for amendment to the Constitution of Zambia in order to give practical expression to the principle of Party supremacy over all other institutions in the land. This expression was given effect in the Constitution of Zambia (Amendment) Act, 1975,² which enshrined in the Republican Constitution both the role of the Central Committee as the policy-formulating body for the Government and revised the functions of Cabinet in relation to policy formulation. On the face of it, this amendment has the effect, or, gives the impression, of placing Parliament vis-a-vis policy matters, under the Central Committee. However, the implementation of policy is the function of Cabinet, consequently, Parliament operates under Cabinet.

The conflict between the Party and Parliament is not very much about whether the latter is an arm or organ of the former, but whether the latter can act 'as Parliament of Zambia'; pass or reject bills presented by Cabinet independent of Party influence. At the 6th National Council of the Party President Kaunda stated that "from now on the Party and Government will not stomach any indiscipline among Members of Parliament masquerading under parliamentary privilege. And so I am now instructing Mr Speaker to take action in making disciplinary rules of

1. Zambia: The 'Watershed' Speech, op. cit., p. 23.

2. Constitution (Amendment) Act, 1975, No. 22, Art. 47A, 47B and 47C.

the Party, of the Standing Orders for which Members of Parliament could be punished for their breach within the precincts of Parliament."¹ That the National Council resolved accordingly.² The Standing Orders Committee of the National Assembly considered the Resolution together with the President's directive and resolved that Standing Order 137 be amended to incorporate a new Standing Order which now provides as follows:-

137A. The Standing Orders Committee is empowered to enforce the relevant disciplinary rules of the United National Independence Party for breaches of the rules within the precincts of Parliament.

On the other hand, the legislation under which some members of the National Assembly were accused of 'masquerading under parliamentary privilege', provides that

There shall be freedom of speech and debate in the Assembly. Such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Assembly.³

The amendment of Standing Order 137 to empower the National Assembly Standing Orders Committee to enforce disciplinary rules of the Party, did not violate this provision in that although the freedom of speech and debate is curtailed in relation to (critical) matters pertaining to the Party, any breach of a Party rule could only be raised by and/or in the Committee and within the precincts of Parliament. The overall effect of this amendment is that any criticism of the Party in Parliament is subject to the scrutiny by the National Assembly Standing Orders Committee. Criticism of the Party by members of the National Assembly outside the National Assembly, is subject to the examination of the appropriate disciplinary committee at the Section, Branch, Ward, District, Provincial or Central Committee level.

It is, however, pertinent to point out that from the point of

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| 1. Zambia: | <u>The 'Watershed' Speech, op. cit., p. 22</u> |
| 2. UNIP: | <u>Progress Report, December, 1975; Resolution No. 11, p. 18</u> |
| 3. Zambia: | National Assembly (Powers and Privileges) Act, 1970, No. 6, Cap. 17, sec. 3. |

the Party, what was in issue in 1975 was not 'freedom of speech' but 'freedom to criticise the Party' in Parliament. Consequently, an MP is free to praise the Party or its leadership or policies in or outside the National Assembly. There was and there is no restriction in that; the restriction is on 'attacking' the Party. So far there has been no report of an MP appearing before the National Assembly Standing Orders Committee charged with an offence under Order 137A. The Party's perception, however, of the role of the National Assembly is simply different from what is actually obtaining in the country at the moment. The Party's view is that debates, or 'controversies' as they are referred to by the Party, are conducted in the National Assembly on very trivial and unnecessary matters. It was, accordingly, projected that -

It is important that during 1979 - 1989 period Zambia frees herself from the traditional ideas of formal bourgeois democracy, and from the customs and habits of alien Parliamentary practice. The State administration and Parliament must be the executive organs of the will of the working class (the workers and peasants). It will be the duty of the Party during this period to -

- (a) establish a socialist Parliamentary system whose representatives should be workers and peasants, as the main classes of State power;
- (b) Parliament should no longer be just a source of income to individual members of Parliament but must be transformed into a real people's house, where laws, aimed at facilitating socialist construction for the common good of the people, must be passed. The Party and its Government should, therefore, review the present Parliamentary procedures with a view to abolishing certain capitalist tendencies and colonial practices.¹

The General Elections of 1983 and 1988 have not produced a Parliament of socialist workers and peasants. As long as the membership of the Party remains open to every Zambian, the membership of the National Assembly will also remain open to every citizen of Zambia. A 'socialist parliamentary system' cannot be achieved as long as UNIP remains a mass organization: it could be achieved with the restriction of the membership

1. UNIP:

Programme (1979 - 1989 : Transition from Capitalism to Socialism; 1978, pp. 134 - 135.

of the Party through a 'vanguard party' membership to achieve a Parliament composed of socialist workers and peasants'. There is an apparent contradiction between this policy and what is actually happening in practice. By abolishing primaries in National Assembly elections in 1983,¹ which the Party used in choosing three candidates per constituency, it threw away a possible tool through which it could have influenced the composition of Parliament. However, the 'free-for-all' electoral system introduced in 1983 is still subject to severe vetting of candidates and enables the Party to determine the composition of the National Assembly, for instance, by keeping out of Parliament those persons whose membership of the House, were, in the opinion of the Committee of Chairmen, inimical to the interests of the State.

The Party's wish appears to be that the National Assembly should be composed of members committed to Party policies and who were always ready to endorse and acclaim the virtues of the Party, its Government and the political leadership. Although in practice there is no way in which Parliament can pass any Bill that is in conflict with the wishes of those in the leadership of the Party, if, however, any such an Act were enacted, it would be a valid law notwithstanding the provisions of Art. 8 of the Constitution of the Party. The provisions of Art. 8 are a device to muzzle MPs. Legislative supremacy in Zambia still resides in the Parliament of Zambia.

(iii) A Vote of No Confidence in the Government.

Backbenchers are not privy to Government secrets or information. The convention which developed during the multi-party system which barred opposition members access to Government information, is applied in barring backbenchers from Government information. In addition

1. Zambia: Constitution of Zambia (Amendment) Act, 1983, No. 1, Art. 75(3) repealing and replacing Art. 75(3) of Constitution of Zambia Act, 1973, No. 27; supra, p. 288.

to its legislative function, the National Assembly performs other functions, for instance, those of being the overseer of the Executive, or of seeking information or explanations from Ministers. Under a One-Party system the role of 'criticising' the Government can be played only by backbenchers; that is, MPs not holding ministerial posts. Of the 135 MPs in the Parliament of 1983-1988, 21 were Ministers and 23 Ministers of State and 91 were backbenchers, including two MCCs who are often included among the Nominated MPs but excluded from Cabinet. After the 1988 General Election the Cabinet has been reduced to 16 members,¹ though the number of Ministers of State has remained the same.

The role of the backbenchers is nowhere spelt out; some engage in exposing the realities behind the facade of Government actions by providing critique of Government activities. It is a risky business which could and does result in the critical MP's application for re-election being vetted by the Central Committee and now the Committee of Chairmen. Between 1974 and 1980 the Government suffered two defeats when backbenchers did not support the Constitution (Amendment) Bill, 1974, which, inter alia, purported to curtail an individual's right to sue the State for wrongful detention,² and the Local Administration Bill, 1980, which purported to introduce a decentralized form of local administration. The former Bill was passed when the right to sue the State was retained and denied only in certain cases.³ The latter Bill was supported only after President Kaunda had addressed the National Council and pleaded with the MPs to pass the Bill.⁴ In 1985 a backbenchers' motion of no confidence in the way the Government handled a land deal in Chief Chiyawa's area, was

1. Times of Zambia, 3rd November, 1988: 'Cabinet Reduced - Cost saving a must - KK', p. 1.

2. Zambia: Parliamentary Debates, No. 36, 31st July, 1974, Col. 344. The Bill was passed and became the Constitution of Zambia (Amendment) Act, 1974, No. 18

3. ibid. Art. 29(8); supra, p. 255.

4. Local Administration Act, 1980, No. 15; infra, p. 357.

carried by 50 votes to 42.¹ Commenting on the Government's defeat, the then Prime Minister, Nalumino Mundia, said that "the result of the vote has no binding on the Government decision".² On the 27th March, 1985, the then Speaker, Nabulyato, censured the Prime Minister and wondered whether "we have reached a stage where we begin to deface our own designed One Party Democracy".³ Whatever that meant, if the Government were bound by the vote of the National Assembly, that might have meant either that it rescinded the land deal or it resigned. It did neither.

Commenting on the role of Parliament under Tanzania's One Party, it was observed that "unless the concept of a one party state is also challenged, the question of empowering the House to move a vote of no confidence against the Government cannot arise; this is a preserve of the multi-party system."⁴ In Zambia the President's and Government's tenure of office is not affected by an adverse vote in the National Assembly. Even under the British (unwritten) Constitution it is a customary practice, a convention, and not a rule of law that a defeated government should resign and that the Monarch dissolve Parliament. The Constitution of Burundi (1981), of Mali (1974) and Zaire (1974) contained the principle of independence of both the President and Government, of Parliament. Ministers are responsible to the President only. The Constitution of Rwanda, on the other hand, provides (Art. 78) that when a motion of censure is carried against the Government, Ministers and Ministers of State must offer their resignation to the President. If such a motion is rejected, the initiators must not propose a new one during the same session.⁵

1. Times of Zambia; 15th February, 1985: 'Chiyawa Land Row in Twist', p. 1

2. Times of Zambia; *ibid.*

3. Times of Zambia; 28th March, 1985; 'Speaker Censures PM'

4. Donge, J.K. and Livinga, A.J., "In Defence of the Tanzanian Parliament", PA, Vol. 39, 1986, 230 at p. 238.

5. Reyntjens, F., "Recent Developments in the Public Law of Francophone African States", JAL, 1986, Vol. 30, No. 2, p. 81.

Under the Zambian system, the Government, which has complete executive authority in the management of the affairs of the country, includes the President. The provisions of the Constitution which vest executive functions in the President,¹ give the impression that the President can receive a resignation from the whole of his Cabinet and thereafter swear-in a new one. Since Cabinet Ministers are well briefed on policy and decisions of the Party and Government, there is often little room or possibility for Cabinet Ministers to differ with the President to the extent that they might decide to resign en block from the Cabinet. In any case resignation from a Cabinet post is something not heard of in African politics; mainly because the Party would take such an action as tantamount to rebellion against the President and the Party warranting expulsion from the membership of the Party and membership of the National Assembly. Backbenchers are, therefore, often met with Cabinet solidarity; a solidarity not based of fear that Government defeat would result in its resignation, but to some extent fear of the Party's reaction against any Minister who failed to support Government decision or policy.

The usefulness in the backbenchers' criticism or defeat of the Government in a vote on a matter before the National Assembly, does not lie in forcing the Government to resign, which it cannot do, but in demonstrating the majority's feeling. In the final analysis, Government depends on the support of a majority in the National Assembly; if the Government was too heedless to criticism or gave inadequate explanation to questions raised by backbenchers or it was subjected to frequent defeats, it would certainly lose credibility and confidence of the nation as a whole. If the Government were to continue in office notwithstanding such constant criticisms and defeats it would convert itself into a dictatorship, ruling willy-nilly the views in Parliament and the country.

1. Zambia:

Constitution of Zambia Act, 1973, provides that
53(1) The executive power of the Republic shall vest in the President and, subject to the provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him.

Although the defeat of the Government in 1974 and 1980 on two major legislation and in a vote of no confidence in 1985 did not result in the resignation of the Government or the cancellation of the Government measure in dispute, the backbenchers' stand showed that there was still some room for freedom of speech and criticism in Zambia's one-party parliament. The backbenchers' failure to influence Government decision might have sent some of them back into their backwall seats to remain silent in frustration, but content with the feeling that "we told them of the demerits of the Government measure". Although in theory neither the Party nor the President can intervene on the side of either the backbenchers or the Government, the President did intervene (prima facie on the side of the Government) in the Chiyawa land deal case when he told a press conference that inspite of the stand taken by the backbenchers in Parliament, the project would go ahead because he was interested in encouraging investment in Zambia.¹ The real cause of conflict between the Government and backbenchers in such matters as the Chiyawa land deal is lack of information: backbenchers are ill~~in~~formed and operate on 'rumours'. There is an unfortunate tendency among African governments to regard everything the Government is doing as 'secret'. Properly briefed, backbenchers would be less critical of government actions. Commenting on the constitutional system in Zambia, it has been observed as follows:

In early 1979 Zambia stood out among the countries of Africa as one of the small minority still maintaining elements of a democratic society. Although legal opposition has been banned by the establishment of a one party system in 1973, the courts maintained a measure of independence, members of the National Assembly spoke out against the government and party, and the press continued to report opinions of the opposition, if in a highly critical tone.²

The one-party democratic state system is not a subject of controversy in Africa to-day. What is still of controversy in each case

1. Times of Zambia; 25th April, 1985.

2. Kaplan, I., Zambia - a Country Study, Foreign Area Study; The American University, 1979, p. 140.

is whether institutions such as the Party, the National Assembly and the Presidency which claim to represent the sovereign will of the people, are democratically constituted and run. There is no doubt that the One-Party systems practised in most African states are transitional and experimental. They should, therefore, be open to public debate, scrutiny and criticism in order to allow them to evolve new indigenous features and gather local roots. The clear division between the Party as the policy-formulating body and the National Assembly as a legislative body, denies the latter the opportunity to discuss its own features and role as these are considered as matters of policy falling within the exclusive jurisdiction of the former.

The One-Party system operating in some African States are different from those existing in Eastern European socialist countries with one dominant political party, the Communist Party. There, for instance, the ruling political party can initiate legislation: Art. 65(1) of the Germany Democratic Republic Constitution (1968), Art. 113 of the USSR Constitution (1977) and Art. 86 of the Vietnam Constitution, (1980).¹ UNIP, for instance, cannot initiate legislation (draft Bills) to the National Assembly through the Party Congress or National Council or the Central Committee; something which the Communist Party of the USSR can do. That is tantamount to reducing Parliament into a sub-committee of the Party.

It is not accurate to say that the National Council of UNIP is the initiator of legislation in Zambia. The National Council can resolve on any subject including changes in the law, but the initiator of legislation is the Cabinet. The trend to expand the role of the Party should not extend to initiation of legislation as that would signal the demise of Parliament. The present freedom to criticise legislation would disappear if Bill came direct from the Party. And not only that, the constitutional convention of

1. Loeber, D.A. (Ed.) Ruling Communist Parties and Their Status Under Law; Martinus Nijhoff Publishers, Dordrecht, 1986, p. 441.

collective ministerial responsibility could be undermined as ministers could be freed from supporting or defending draft legislation originating from the Party. The most cynical members of the National Assembly would wonder why the Party did not simply assume legislative role itself. There are many reasons why the Party cannot do that, for instance, most of the political leaders are aware that the law of any State means that body of rules designed to regulate the conduct of people and affairs living in that state and which the courts recognize and enforce. Often Parliaments or National Assemblies are the traditional institutions whose enactments are recognized as 'law' by both the people and the courts. Some resolutions or decrees of a political organization would most likely not enjoy such recognition.

No UNIP organ drafts or sends Bills to be enacted into law by the National Assembly. The National Assembly is said to be an organ of the Party only in the sense that it is composed of members of the Party and that the legislation it enacts originate from an Executive composed of members of the Party. In reality, the National Assembly is a national representative body composed of members elected by the people of Zambia, the majority of whom are not members of the Party. Consequently, no organ of UNIP can resolve on the dissolution of Parliament. That is a matter for Parliament. The role of UNIP in as far as the day-to-day functioning of Parliament is concerned, is, or should be, nominal. But the provisions of the Constitution of the Party,¹ and the practices that ensure that no utterances are made in the National Assembly critical of the Party, have compelled Parliament to function under the dark shadow of the Party. The Party displays pessimistic distrust of the popularly elected MPs. This pessimism has retarded the growth of a genuine democratic culture albeit under a One-Party system. Unless and until there is freedom of speech in the Party itself, there cannot be freedom of expression in Parliament.

1. UNIP;

Constitution, 1988, Art. 8; supra, p. 322.

Section 4. Removal of President from Office: Role of Party and Parliament.

Although the Constitution of UNIP provides that in the event of the President of the Party resigning or being removed from office of the President of the Party or of the Republic, he shall cease to be President of the Party and the Secretary-General of the Party shall act as President until a new President is elected,¹ the procedure to be followed and the body to remove the President from office is not expressly provided for. Presumably, being an MCC, the Appointments and Disciplinary sub-Committee of the Central Committee which exercises disciplinary jurisdiction over MCCs, would be the body to prefer a charge against the President. In Tanzania, the CCM Constitution provides that the election and removal of the Chairman of the Party (who is equivalent to UNIP's President and Chairman) shall be done by resolution of the National Conference (which is the equivalent of UNIP's Party Congress) supported by at least two-thirds of the members from the mainland Tanzania and two-thirds of the members from Zanzibar.² So far, both UNIP and the CCM have not removed the Chairman or President of the Party on disciplinary grounds.

Nigeria has had experience in removing top political party leaders and State Governors, from office. In Rimi (Governor of Kano State) and Musa (Governor of Kaduna State) v. Kano, S. Ikoku and People's Redemption Party,³ the plaintiffs were expelled from the respondent political party by the first and second defendants whom the plaintiffs alleged had flouted the provisions of the Party's Constitution. They sought Court's declarations, inter alia, that the expulsions were null and void. Since evidence showed that the procedure as laid down in the Constitution of the party was not followed in making the expulsions, the Court held that the expulsions were unconstitutional and therefore, null and void.

1. UNIP: Constitution, 1988, Art. 78(a)

2. CCM: Constitution, 1977, Art. 65(b)

3. (1982) 3 NCLR 478

In Zambia the Constitution of the Party provides that a member of the Party who violates the Party Constitution, Regulation or Rule or who does not fulfill the decisions and directives of the Party or misuses his Party or State position or in any way acted in a manner prejudicial to the prestige of the Party or State¹ shall have sanctions applied against him. The sanctions include expulsion from the membership of the Party.² Under the Constitution of Zambia the President can be removed from office for inability to perform his official functions due to incapacity or for violation of the Constitution or gross misconduct or loss of the membership of the Party. 'Gross misconduct' includes a breach of the Leadership Code. We shall consider the legal effect of the removal of the President, first, where the former President remains a member of the Party, and secondly, where he is expelled from the membership of the Party.

(i) Where the Former President Remains a Member of the Party.

Once a person has been elected the President of the Party and of Zambia, he ought to retain the necessary qualifications of the President, e.g. the citizenship of Zambia and membership of UNIP.³ It would appear that if a person was removed from the Presidency of the Party but remained a member of UNIP, such a removal would not terminate the Presidency of the Republic because the President of Zambia can only be removed from office in accordance with the provisions of the Constitution of Zambia. Although the Constitution of Zambia provides that the Party Congress elect the Party President who becomes the sole Presidential Candidate, it does not expressly provide that one of the essential qualifications for the President of Zambia is the presidency of the Party. It is, therefore, possible for the President of the Party to be removed from office while remaining the President of the Republic. Both the Constitutions of the Republic and the

1. UNIP: Constitution, 1988, Art. 21 and Reg. 8(1)

2. ibid. Reg. 15(5) (f)

3. Zambia: Constitution of Zambia Act, 1973, Art. 38(2)

Party are silent on the effect of a removal of a person from the presidency of the Party while he remained the President of Zambia. Only the converse is provided for that when a person is removed from the office of the President of the Republic he ceases to be the President of UNIP.¹ It is, however, very unlikely that a person who has been removed from the office of the President of the Party would be allowed to continue as President of Zambia. The Committee of Chairmen is bound to call an extra-ordinary Party Congress to elect a new President of the Party. The legal problem in that case would be that the new President would not be a 'Presidential Candidate' unless the President dissolved Parliament.² If he refused to do so, the Party and country would be thrown into a constitutional crisis. The solution to the problem would be expulsion of the President from the membership of the Party.

(ii) Where the Former President is Expelled from the Party.

Where a former President of UNIP is expelled from the membership of the Party, he would automatically cease to be President of Zambia because he would have lost one of the essential qualifications for holding the office of the President of the Republic, namely membership of UNIP. The Secretary-General becomes the Acting President for a maximum of three months and he is not empowered to dissolve Parliament or revoke any appointment made by the President.³ The consequence of that provision is that Parliament (that is the National Assembly and the Acting President) would continue and the Party Congress would be convened to elect a new President of the Party who becomes the sole Presidential Candidate and a 'Yes' or 'No' election would be conducted solely to elect the President of the Republic. Once duly elected, he is the only person who can dissolve Parliament.

1. UNIP: Constitution, 1988, Art. 76(1)

2. Zambia: Constitution of Zambia Act, 1973, Art. 31(1)

The cases of Nkumbula and Kapwepwe v. Attorney-General,¹ and Rimi and Others v. Kano, S. Ikoku and People's Redemption Party,² show that Courts of law can intervene in political party matters in an attempt to safeguard members' rights and interests. Due to their rather weak legal position, it is very unlikely that political parties' rules can effectively oust Courts' jurisdiction from Party matters. State Constitutions have at times ousted Courts' jurisdiction from cases involving membership of the House of Representatives. For instance, the Constitution of Nigeria of 1978 had provided that

170(10) No proceedings or determination of the Committee or of the House of Assembly or any other matter relating thereto shall be questioned or questioned in any court.³

In Musa v. Hamza and Others,⁴ the applicant for a writ of prohibition against a seven-man committee appointed by the Speaker of the Kaduna State House of Assembly to investigate allegations of gross misconduct made against the applicant when he was Governor of the Kaduna State, failed to persuade the Court to entertain his application. The Court held that the exercise of the power of removing a Governor from office under sec. 170 of the Constitution of Nigeria of 1978, was purely legislative constitutional affair quite outside the jurisdiction of the courts by virtue of sec. 170(10) of the Constitution,⁵ cited above.

Although the Constitution of Zambia does not contain some provisions similar to those in sec. 170(10) of the Constitution of Nigeria of 1978, the removal of the President of Zambia for violation of the Constitution or gross misconduct, is a legislative constitutional affair in that the President ought to be removed by an affirmative resolution of the National Assembly supported by the votes of not less than three-quarters of all the members of the Assembly.⁶ Such a resolution cannot be questioned in a Court of law or any other place.

1. (1979) ZR 267; supra, p. 159.

2. (1982) 3 NCLR 478; supra, p. 333.

3. Nigeria: Constitution of Nigeria (Enactment) Decree, 1978, No. 25

4. (1982) 3 NCLR 439

5. ibid. per VJO Chigbue, J., at p. 449

6. Zambia: Constitution of Zambia Act, 1973, Art. 41(5)

CONCLUSION.

This Chapter has considered the relationship between the Party and Parliament, the manner in which UNIP's Committee of Chairmen approves or disapproves the candidature of prospective members of the National Assembly, the role of the judiciary in election cases, and, the role of the National Assembly in general and of the backbenchers in particular. The controversial aspects of the relationship between the Party and the National Assembly are the vetting system and the purported restriction on the power of Parliament to enact laws as it saw it. Although the jurisdiction of the Courts has been ousted in matters pertaining to adoption of Parliamentary candidates by the Committee of Chairmen, the Committee is obliged to act fairly as it exercises quasi-judicial function. It is difficult to define a quasi-judicial function or capacity as observed in the following comment:-

what however is a quasi-judicial capacity has, so far as I know, never been exhaustively defined. It seems to me to cover at any rate a case where circumstances in which a person who is called on to exercise a statutory power and make a decision affecting basic rights of others, are such that the law impliedly impose on him a duty to act fairly.¹

The Committee of Chairmen exercises statutory powers and the rather large number of persons vetted, e.g. in the 1988 General Election, gives the impression that the Committee might in some cases not act fairly.

The increase in the number of judges and the availability of appeal to the Supreme Court against a decision of the High Court in National Assembly petition cases will not eradicate corrupt electoral practices. These will continue until an effective machinery is devised to lessen or eliminate bribery during the election campaigns. A law could enable the Party to play an active role in preventing corruption. Caution, however, should be exercised in giving the Party such a role lest unscrupulous politicians used such a law in frustrating the election of their opponents. One of the merits in the present law is that all cases of alleged electoral malpractices are not handled by the Party but are decided

1. Re K (H) (and Infant) /1967/ 1 AER 226, per Lord Justice Salmon.

by the courts of law. Unfortunately the courts have failed to assert their role, hence the recent changes in the law. It is hoped that the courts will now and in the future stand-up to the challenge posed by corruption in elections. The courts' usefulness is, however, very much like that of a sentinel called upon not to keep guard before the event, but after the event has taken place.

The sovereign will of a people is expressed through elections and the representative assembly. No political party in any society can claim to rival it. There shall always be a Parliament in a one-party system. If the function of any such parliament is to be meaningful and not being (seen as) a ceremonial rubber stamp of the Party, it should assert itself and show its true potential. Backbenchers, unlike Ministers, should not be scarred or deterred from criticising Government measures. In order to enable them perform such a role effectively and not ignorantly, they should be provided with basic information on the work of the Party and the Government. Under a One-Party system the Party and the Government should be more liberal than under a multi-party system in supplying MPs with information. Under a multi-party system there is fear of leakage of confidential or secret information to opposition parties. One of the most serious causes of failure of Party and Government decisions and projects in Zambia is that fundamental decisions are arrived at or made by important bodies or persons who are denied vital information by the Party or the Government mainly on the ground that such information is confidential or secret. Backbenchers are also victims of such 'black-out'.

One of the unsatisfactory aspects of the one-party system is the want of individual accountability of MPs. The electorate has no power to recall its MP to answer or explain his deeds (or absence of them) or to move a vote of confidence (or no confidence) in him regarding

his performance in Parliament as their representative. The body which has power over an MP is the Party itself. The majority of voters in any Parliamentary constituency are not members of the Party. In practice an MP cannot call a 'general meeting' of his constituents; he can only address a political meeting convened by the Section, Branch or Ward Committee or Council of the Party. There is, therefore, a need for a machinery through which voters -members and non-members of the Party - can come together to receive reports from their MP and to review his performance and should a need arise, to move a vote of confidence or no confidence in him or her. *or JORD*

It is not yet opportune for a return to a multi-party Parliament in Zambia because there are indications that such a system could be exploited for tribal ends. A multi-party system requires political maturity and patience; qualities which are still wanting among those engaged in political activity in Zambia to-day. Ideally, there should be one Constitution under a One-Party system providing for a President, a National Assembly and a 'national cabinet' in place of the Central Committee, Committee of Chairmen and Cabinet. There should be Ministers responsible for Party and Government affairs. Such a streamlined Party and Government administration would necessitate drastic changes in the present law on Parliament and 'societies'. Such an arrangement would probably be opposed by the politicians as it would remove the mask of the 'supremacy of the Party' behind which they masquerade. And yet it would reflect the reality of the Zambian situation under which the Secretary-General and the Prime Minister are Presidential appointees responsible for Party and Government affairs, respectively. The Central Committee, Committee of Chairmen and Cabinet are composed and dominated by the President and could be reduced into a single body which might perform more efficiently than the present institutions.

CHAPTER VIII.LOCAL ADMINISTRATION : INTEGRATION OF UNIP AND LOCAL AUTHORITIES.The Party, District Administration and Maintenance of Law and Order.Introduction.

Although UNIP functionaries were deployed in provincial and district administration immediately following Independence in 1964,¹ the Party did not attempt a review of local government system until late in the 1970's. The One-Party system introduced in 1972 though devoid of a definite ideological basis, it was influenced by a combination of factors drawn from nationalism, socialism, party popularism and quasi-traditionalism. The One-Party-Government was portrayed as the expression of the unity and the general will of the nation, the people: it represented the organic moral community whose interests it interpreted. Therefore, order and unity were paramount and all cleavages and all conflicts were illegitimate.

Structurally, the one-party apparatuses did not prove to be strong mobilization and transformation instruments. Rather, they tended to become public relations agencies for the central government and for propagating Party policies than for the implementation of social and economic projects. That was understandable. At Independence Zambia inherited a social system under which the Government left much of the provision of social and economic services such as education, housing, health and public transport to private enterprise, the huge Mining Corporations and the Christian Churches. Local Government authorities also provided social services and amenities such as water, housing and sanitation. The Party, however, had no role in the social or economic field; its role was confined to the political mobilization of the people. The Party was, therefore, concerned with 'participatory democracy' at the local as well as the national level.

1.

Supra, p. 189.

This Chapter looks at the historical background of local authorities in Zambia, the integration of UNIP and local authorities and the role of the Party in the maintenance of law and order at the grassroots level. The hypothesis in this Chapter is that the One-Party system has generally meant the emasculation, but not necessarily the elimination, of the liberal democratic structures with the use of Party plebscite and other forms of elections and controlled representation on local authorities.

Section 1. The Development of Local 'Government' and 'Authorities'.

Local government in Zambia was not a colonial product; for it was there in the form of indigenous tribal authority which was cleverly exploited by the British colonial administrators through the indirect-rule system. Where there was no viable indigenous tribal authority to save and serve colonial interests, for instance among the Tonga of the Southern Province, such an authority was deliberately created: a chieftainship was instituted.

The early system of local administration in NR was based on 'urban' and 'rural' areas. During the period between 1890 and 1911, the BSAC in accordance with the terms of its Royal Charter, promoted the 'good' government and preserved the peace, of the Regions under its administration. Although the North-Eastern Rhodesia Order in Council, 1900, referred to 'settlements by natives',¹ that simply stated the situation as it existed at the time and did not create segregated areas for natives and non-natives. As a matter of fact, the whole Region was settled by natives. The Village Management Proclamation of 1900, however, empowered Village Management Boards to administer small communities around the sidings along the railway line which was progressing across the country from the southern border (Livingstone) to the Copperbelt. The rest of the country was left to be administered by the BSAC officials and through chiefs and headmen who were responsible for carrying out some administrative duties and functions such as

1. UK: The North-Eastern Rhodesia Order in Council, 1900, Art. 41; Statute Law of Northern Rhodesia, 1917; p. 37, Supra, p. 40 et seq.

collection of taxes, control of the movements of natives from rural to urban centres and maintenance of law and order.¹ Legislation on the administration of 'urban' and 'rural' areas was in the form of Orders in Council, op. cit., amplified by the Proclamations of the High Commissioner,² and Regulations of the Resident Commissioner. The Orders in Council were to prevail over the BSAC's Charter of 29th October, 1889, as amended, and the powers conferred by the Orders in Council were in augmentation of the powers conferred upon the BSAC by the Charter. Legal segregation or the creation of natives and non-natives areas was formally introduced by the Natives in the Townships Regulations, 1909, made by the Resident Commissioner, which provided that no native other than a native permanently employed by a European or an Asiatic employer should reside within 'a township' to which the Regulations applied.³ The effect of that legislation when read together with the provisions of Art. 38 of the 1900 Order in Council, which provided that a Secretary for Native Affairs, a Native Commissioner and Assistant Native Commissioners should be appointed "for the administration of natives", established in the territory two distinct systems of local administrations: one in the areas around and along the line of rail, village management areas, copper-mining sites and farmlands occupied by non-natives - mainly areas of non-subsistence economic activity - and the rest of country settled by the natives. The former came to be referred to generally as 'urban areas', while the latter became the 'rural areas'.

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1. NER: Administration of Natives Proclamation, 1916, No. 18, Secs. 3, 4, 11(2), 14 and 15.
 2. NR: See Proclamations No. 1 of 1907, No. 11 of 1911 and No. 48 of 1913 regarding the management of Livingstone and Lusaka areas.
 3. NER: Natives in the Townships Regulations, 1909 as validated by the Natives in the Townships Regulations (Validation) Regulations, 1909, No. 6. The Regulations were declared invalid having been assented to the Governor (of Nyasaland) without the prior approval of a Secretary of State as required by the Order in Council of 1900.

(a) Rural Administration.

The administration of 'rural areas' was vested in the Administrator whose functions in this regard were summarised by the legislation which empowered him "to exercise over all natives political power and authority, subject to such powers as might be reserved by an Order in Council or Proclamation to the Secretary of State or to the High Commissioner".¹ The assumption of direct control of NR by H.M.'s Imperial Government in 1924 from the BSAC administration, did not bring about a significant departure in both policy and practice vis-a-vis the administration of natives, except that the person to exercise over all natives political power and authority was the Governor assisted by the Secretary for Native Affairs, the Native Commissioner and his Assistant Native Commissioners, Provincial and District Commissioners, and, Chiefs and Headmen. It is quite obvious that a population of less than two million natives in 1924 must have been over-administered with such a large number of administrators at every level. A major change in native administration came in 1929 when the Governor was empowered to create superior and subordinate native authorities;² the functions of the native authorities, however, remained those as laid down in the Administration of Natives Proclamation, 1916, namely the collection of taxes, maintenance of law and order and upholding of native law and customs. Chiefs were allowed to perform some judicial functions mainly in non-criminal matters between natives.³ A system of full-fledged native authorities began to emerge when native authorities were empowered to collect revenue through fines, fees, taxes and licences and allowed to receive ten per cent (10%) of native tax collected by the central

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1. NR: Administration of Natives Proclamation, 1916, op. cit., sec. 3.
 2. Native Authorities Ordinance, 1929, No. 32
 3. Native Courts Ordinance, 1929, No. 33

Government from tax-payers who originally came from their district. Native treasuries were accordingly set up to administer such funds and thus a system of native authority gradually got established. It was obvious that the Native Authorities Ordinance of 1929 and of 1936 which replaced it, purported to introduce in NR 'indirect rule' principles adopted by the British administrators in West Africa. According to these principles, native authorities, re-vitalized and reformed ought to have been encouraged and indeed required, to shoulder the responsibility, on behalf of the colonial administration, to administer native affairs in native settled parts of the country: such liberty and self-development could be best secured to the native population by leaving them free to manage their own affairs through their own rulers, proportionately to their degree of development and advancement, under the guidance of the British staff and subject to the laws and policy of the administration.²

In NR the system of native administration was heavily under British CO and BSAC officials, emphasis being laid on the development chiefs' rule subordinated to district and provincial commissioners. The system was therefore, non-elective and unrepresentative. There was therefore no room for political organization. The Native Authorities Ordinance, 1936, remained in force until repealed by the Local Government Act, 1965.³ Notwithstanding the emergence of the native welfare societies in urban areas in the 1930's,⁴ administrators found districts in NR easy to govern, people being committed to their cattle wealth, agricultural activities more than to political activity.

1. NR: 1936, No. 9.

2. Lugard, F.D., The Dual Mandate in British Tropical Africa; Blackwell, London, 1926, p. 24.

3. Zambia: 1965, No. 69, Cap. 480.

4. Supra, p. 58.

(b) Urban Administration.

Constitutions establish a framework within which the government and administrative agencies of the State operate. The colonial system of administration was based on the British model which is not founded upon a written Constitution. Flexibility is often seen as one of the great virtues of the British Constitution which allows adaptation to changing situations without loss of the fundamental respect that prevails for the country's institutions. In NR although there was the Legco and the Executive Council, the system of government was not based on a party system; consequently, there was no responsibility to an electorate on the part of the governors. Although the country was divided into nine Provinces, there was no overall legislation providing for 'local government' of these areas. Instead, the territory was administered through a series of legislation designed to regulate each area in accordance with its historical, geographical and economic background or activity. Thus, the Municipal Corporation Ordinance, 1927,¹ applied to urban areas with a cosmopolitan population concentration, for instance, such centres as Lusaka, the capital (after 1935), Livingstone (the capital in 1927) and Ndola, the largest town which developed outside the Copperbelt; the Townships Ordinance, 1929,² which applied to centres with fewer people than municipal areas, e.g. provincial capitals such as Fort Jameson (Chipata); and, the Mine Townships Ordinance, 1932,³ which applied to towns and townships established by the giant mining corporations for their economic activities including the housing of their labour force. The relationship between the Municipal Corporations, Townships and Mine Townships Boards on one hand and the Government on the other hand, was dominated by the Executive (the Governor and his Executive) which was ultimately responsible to H.M.'s Government in the UK through a Secretary of State (for the Colonies).

The colonial policy in NR was against the urbanization of the African ostensibly on the ground that that would lead to 'detribalization'

1. NR: 1927, No. 16, Cap. 470
 2. 1929, No. 53, Cap. 471
 3. 1932, No. 11, Cap. 472

which would in turn result in 'disstabilization' of the African society and colonial administration in the country. Following the emergence of African political and labour organizations soon after the end of the Second World War, which demanded recognition of Africans' presence and property rights in urban areas, areas began to be set aside for African townships in urban areas and the Department of Local Government and African Housing was established in 1947 to coordinate, among other things, the settlement of Africans in urban areas particularly on the Copperbelt. But Africans' presence in these areas was regarded as an exception to the rule that they should not be there. As a result, Africans were not entitled to participate in the civic or administrative affairs of the municipal councils or townships boards. Instead, African Housing Boards and African Advisory Committees were established composed of African town-dwellers to advise municipal councils and townships boards on African interests. This arrangement continued throughout the period of the Federation of Rhodesia and Nyasaland (1953-63) and prompted the Advisory Commission on the Review of the Constitution of the Federation, to observe that

We think Africans should be able to qualify for the vote in municipal and other local council elections. We also think that they should be directly represented on the councils themselves and not merely on advisory bodies associated with them.¹

Africans did not have the vote and could not participate in local council elections either as voters or candidates. The vote was restricted to property owners, including corporations and persons who paid rates. Most Africans lived in municipal or mining companies' compounds and did not own property or pay rates. The forces which devised the policy which denied the vote to the African at the national level,

1. UK:

Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland; 1960, Cmnd. 1960/1148, p. 76, par. 224; supra, p. 77.

were the same forces that determined who should or should not have the vote at local government level: the settlers and the CO officials. A grant of the vote to Africans at the local government level could only come with a change in policy vis-a-vis the enfranchisement of the Africans at the national level. Consequently, UNIP's fight for the control of the national Government based on one-man-one-vote, was waged simultaneously with that of the control of local government councils and the grant of the vote to Africans in local council elections. Accordingly, the grant of the vote to Africans at the national level which resulted in the formation of a UNIP-ANC Coalition Government in 1962, brought changes in local council elections though not in local government system itself. The Local Government (Elections)(No. 2) Ordinance, 1963,¹ passed by the coalition government, provided, as an interim measure, for African direct representation in local councils on racial parity basis. Kenneth Kaunda's first government post was that of Minister of Local Government, and, commenting on the enactment of that Ordinance, said, inter alia, that

In the field of local government we are shortly to hold elections which will, for the first time, bring parity between elected African and non-African councillors. This is in my view, a big step in the right direction.²

After Independence the Local Government Act, 1965,³ placed Native Authorities under the Ministry of Local Government and renamed them Rural Councils. The first national election for urban and rural councils were held in December, 1966 and both UNIP and the ANC took part. The second election took place in July, 1970. In most of the districts UNIP captured the majority of the seats except in Southern Province in which virtually all seats went to the ANC and in most cases with very

1. NR: 1963, No. 23.

2. Legum, C., Zambia; Independence and Beyond; Nelson, 1966, p. 11.

3. Zambia: 1965, No. 69, sec. 2 defined 'Council' to mean the Municipal Council, the Townships Council and the Rural Council.

substantial majority, for instance, in Namwala, the results were as follows:¹

	<u>UNIP</u>		<u>ANC</u>	
	Votes	%	Votes	%
1966	1,265	18	5,612	82
1970	1,491	30	3,425	70

The electors were persons resident in the council ward registered as voters for the purposes of the election of members of the National Assembly;² the vote was granted to all adult Zambians, unless otherwise disqualified. That meant that local councils became objects of political party contest. UNIP's drive to control local authorities began early. It has been said that UNIP's desire to change administrative structures in the later years was influenced by apprehension when it began to lose support from industrial workers and villagers.³ That statement is not supported by any evidence. However, even in the Southern Province where UNIP was 'weak', it was gathering rather than losing support as the above figures show. In fact it was the ANC that was losing ground to UNIP.

The period between 1970 and 1980 was dominated by two major problems for UNIP; how to reconcile the local government system based on cities (three of them), municipalities (five), townships (sixteen) and rural councils (fortythree),⁴ and how to eliminate the ANC's persistent control of councils in the Southern Province. The following Section discusses how UNIP went about to solve these two major issues.

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1. Zambia: Local Government Election Results, 1966 and 1970; Director of Elections, Elections Office, Lusaka.
 2. NR: Local Government (Elections) (Amendment) (No. 2) Ordinance, 1963, No. 23, sec. 14(1), repealed by the Local Government Elections Act, 1970, No. 1, Cap. 482, secs. 14(1) and 16.
 3. Lungu, G.F., Administrative Decentralisation in the Zambian Bureaucracy: An Analysis of Environmental Constraints; Institute of African Studies, UNZA, 1985, p. 32.
 4. Simmance, A.J.F., "The Structure of Local Government in Zambia" in Hawkesworth, N.R. (Ed.), Local Government in Zambia; Lusaka City Council, 1974, pp. 4 and 9.

Section 2. Early Deployment of Party Functionaries at District Level.

The continued and persistent existence of the ANC in the Southern Province contributed a great deal to the form of government at district level UNIP adopted in its transition from being a 'freedom-fighting' political party to a ruling party. At district level in order to establish a firm and institutionalized control by UNIP over the bureaucracy and the inhabitants and to implement what President Kaunda called 'decentralisation in centralism'¹ - which actually meant allowing local people to conduct their daily affairs under the leadership of party officials centrally appointed - the Party set out to assert its leadership.

(a) Economic Change, Social Class and Political Formation.

During the colonial era economic change differentiated the regions of NR economically and resulted in sections of the population developing differing experiences and interests. In most of the country opportunities through the traditional economy were closed off by European and Asian control of manufacturing industry and trade. Labour migration became the primary means of obtaining cash with which to purchase the manufactured goods and to pay the taxes demanded by the government. Where there were few opportunities at home able-bodied men were syphoned off through free migration or compulsory labour contracts to work on mines, farms and line of rail in SR, South Africa and the Congo (Zaire) reducing rural production to mere subsistence for those who remained at home. The Copperbelt, on the other hand, was incorporated into underdeveloped economy of the north, centre and east of the country, providing work, wages and goods for their migrant workers. These areas formed an integrated system of subsistence and urban migration; men and

1. UNIP:

President Kaunda opening UNIP National Council, 9th November, 1968.

later whole families spending the best of their most productive years of their lives away from their tribal areas. The same pattern was also largely true for the North-Western and Barotseland (now Western) Provinces although urban employment from these areas was sought mainly in the Congo and SR. Before independence a further development was taking place among a smaller section of the African urban population; the emergence of a stabilized urban population, a young generation that knew nothing of the rural areas and would not be interested in retiring to them. But there was one large part of the country and some smaller ones, where there developed a different pattern of incorporation into the colonial economy, and consequent different experience and political alignment. In contrast with the subsistence-migration economy which had arisen in most of the country, the Southern Province saw instead a transition from traditional subsistence towards a cash-crop oriented peasant economy. In social terms that means that at independence the Southern Province had developed a deep-rooted peasant culture - a nascent class - to which most rural inhabitants aspired; a culture based on land and cattle ownership and cash crops. That contrasted with other rural areas of comparable size and political importance, for instance, the northern Province.

A further crucial social category was also in formation during the later colonial period. The men who had gone furthest in education became a small class of professional men. These became teachers and administrative personnel. A category which failed to develop significantly until after independence, was that of small businessmen and traders; an absence due to the monopoly of trade by Europeans and Asians. The split in the NRANC in 1958 and the formation of ZANC and later UNIP¹ was not mere a 'tribal' or 'regional' affair, but had deeper implications. The NRANC of the early 1950's had derived

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Supra, pp. 72-75.

its leadership from teachers or ex-teachers and its initial stimulus from towns. The rural areas at first provided only passive, though mass, support. The formation of UNIP then drew off the bulk of the urban and more educated supports and activated the majority of those subsistence rural areas which provided most of the country's industrial workers. The ANC changed its nature, intensified its rural activity particularly in the southern and central provinces and developed increasingly the characteristics of a party of small-scale cash-crop farmers and petty rural entrepreneurs. It was led by men who, although some were educated, nevertheless understood and shared the conservative values of its supporters. The ANC became essentially a homogeneous single party, a peasant party. UNIP, on the other hand, was enlarging itself to become the party of government incorporating different social categories, gaining virtually undivided support in the urban areas and rural areas so closely linked to those in the migration-subsistence economy. As its success became assured, the members of the embryonic administrative class comprising most of the educated population, were bound to support it because they were assured of opportunity to utilize their acquired western education and skills in co-operation with the dominant majority party. Thus UNIP became the 'ruling party'.

(b) Problem of Being a 'Ruling Party'.

At independence and thereafter there was competition for the limited resources and positions in government and the party, UNIP. Secondly, there were the divisions created by the Party and the Government having to rule its own supporters as well as the rest of the inhabitants; some of the Government decisions and actions were bound to be against the interests or wishes of those who put the Party into power. Authority came frequently no longer from the people, but from the top. These problems were often referred to as the 'post-independence crisis of expectation', but they were not confined

to Zambia alone, but to most of the newly independent states of Africa. The other 'problem' was that of the 'opposition' to the ruling party, e.g. the persistence, though on a declining scale, of the ANC in Zambia. One of the solutions to these problems was sought in the adoption of the philosophy of Humanism; but Humanism could not solve such problems. Before UNIP became Government, the fight was against colonial rule, racial discrimination and the Federation. After Independence, President Kaunda proclaimed that the fight was against poverty, ignorance and disease. The ANC's opposition, however, compelled UNIP leadership particularly at the district level, to contradict the policy on the eradication of poverty, e.g. there were several cases in which District Councils dominated by UNIP councillors resolved against trading licences being held or granted to ANC supporter¹ unless and until such a supporter joined UNIP.²

Much of the ANC's criticism highlighted UNIP's difficulties and accusations that UNIP was incompetent to govern, although if the ANC had ever gained power there was nothing to suggest that it would have been exempt from similar problems of ruling because governing is in itself a divisive process. However, such propaganda - and how to counter it - was one of the reasons for UNIP's early deployment of Party officials at the district level. Internally, UNIP had to resolve tribal identification not caused by the masses due to loyalty to their primordial ethnic groupings, generated at the top by politicians competing for position, influence and resources. The Party resorted to careful tribal balancing in the allocation of offices in the Party, the Government and parastatal organizations. That meant that gradually the personnel, machinery and the resources of the

1. Chilufya v. City Council of Kitwe (1967) ZR 115, the Council's resolution was held ultra vires sec. 3(a), Market Ordinance

See also The People v. Livingstone Municipal Council Ex Parte Simioti (1969) ZR 53.

2. The People v. Luanshya Municipal Council, Ex Parte Chendaeka (1969) ZR 69; the Court ruled that the Council's order should be removed into the High Court to be quashed as ultra vires the Trades Licensing Act, 1968, No. 41, sec. 15(1).

government were brought to support the party.

(c) Party Structure and Organization.

At independence UNIP's formal structure at the district level was headed by a full-time official paid direct from the Party's headquarters in Lusaka; the Regional Secretary. He was the key person in party organization and in 1966 in a Presidential directive he was appointed chairman of the District Development Committee which was composed largely of civil servants, replacing the District Secretary, who was a civil servant, who became the Secretary of the Committee. In most districts the Regional Secretary was a local man, e.g., an active party member who was asked to give up a teaching post to become a full-time organizer. Later, men from the line of rail were sent to some districts as Regional Secretaries. In 1968 the importance of the Regional Secretary was diminished by the appointment of a DG by the President to each of the districts. These were high-level political activists with responsibility over the civil servants, e.g. the District Secretary and over party officials, e.g. the Regional Secretary and his colleagues, the Branch officials.¹

The close identification of UNIP with the Government was a central aspect in the Party's policy and effort to win over all the districts. Before independence party Landrovers were painted on their doors with the slogan: 'UNIP IS POWER', i.e. organizational strength. In the 1966 local government election, the painting changed to 'UNIP IS GOVERNMENT', and in the 1970 election, the painting was simply, 'UNIP'. The opposition ANC had no DGs, although it had district organizers and Landrovers painted 'ANC'. Predictably, much of ANC's criticism of UNIP was against that identification: of civil servants working for or under UNIP and of government machinery being used to promote the interests of the ruling party and the manner UNIP had increasingly utilized its political power,

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Supra, p. 189.

especially the way that both Party and Government decisions had emanated from State House - the authority of the President himself. The ANC was opposed to the purported integration of UNIP and the Government. The egalitarian people of the Southern Province who solidly stood behind the ANC, subservience on the face of authority was despised. A large area of the Province had no traditional chiefs and where they existed, the majority had been installed by the British administrators¹ and these were regarded as equal amongst their subjects or at most as primus inter pares. Hence, leaders in the ANC were not dominant figures but they were regarded as senior members of the party who had achieved a leading position.

The deployment of UNIP functionaries into district administration was, in addition to 'keeping the party going' to spread the Party's philosophy of Humanism, weaken or eliminate the ANC opposition and to harmonize the relationship between and among UNIP leaders and the Chiefs and Headmen and the hierarchy in the civil service. The Chiefs Act, 1965,² provides for the recognition, appointment and functions of Chiefs, Deputy Chiefs or Sub-Chiefs and Kapasos (assistants). The President may, by a statutory order, recognize any person as being a Paramount Chief, Senior Chief or Sub-Chief with a prescribed area.³ Such a person must be entitled to hold that office under 'African Customary Law'. However, the President may withdraw or suspend the recognition of a Chief, if the Chief has lost his entitlement to the position or in the interests of peace, order and good government. Chiefs perform 'traditional functions' allowed under Customary Law, except where these infringe the constitution or any written law or are repugnant to natural justice or morality.⁴ 'Traditional functions' do not include political organization, consequently, political mobilization was and is left to political parties such as the ANC and UNIP.

1. NR: Native Authority Ordinance, 1936, No. 9, sec. 3(1).

2. Zambia: 1965, No. 67, Cap. 479.

3. ibid. sec. 3.

4. 'repugant' or 'unjust' customary rules included such matters as betrothal for prepubescent girls, widow inheritance, institutionalized wife lending and adultery, and forced matrimonial reconciliation in husband-wife disputes.

Although there is no system of local government that is without its own patent and latent defects or shortcomings, the view prevailed that there should be introduced a new system of local government in Zambia consonant with the established One-Party system. The new system was intended to rectify some identified shortcomings, in particular the poor co-ordination between the Government and Local Government authorities, lack of statutory powers among provincial and district Party functionaries and development committees, the multiplicity of public officers in the local government system and the role of UNIP in local administration.

UNIP's aim at controlling the new system was revealed by a prolonged debate in the Party on the future application of the phrase 'Local Government'. The Party leadership was concerned by continued use of the term in Zambia's public administration. The phrase was objected to on the ground that it implied the presence of more than one 'Government' in the country. The new system was intended not to create 'Local Governments' but decentralized 'local administration': the difference was said to be that the former implied the existence of independent and autonomous self-governing bodies, while the latter meant a body of persons administering their local affairs under the control of the (Party and its) Government. The objection to the phrase 'Local Government' was in line with the Party's policy that, e.g., the word 'President', should not be used to refer to any other office-holder in any organization in Zambia, except to the holder of the office of President of the Party and the Republic of Zambia.¹ Consequently, 'Government' should be restricted to apply or refer only to the Government of Zambia. The debate on the use of the phrase 'Local Government' also revealed the Party's perception of the composition and role of local authorities and the form of electoral system to be adopted in the election of councillors: local authorities were not to govern but administer their districts.

1. Zambia:

Consequently, e.g. the President of the ZCTU is now Chairman-General; infra, p. 423. Similarly, the title Secretary-General is restricted to the Secretary-General of UNIP and the Secretary-General to the Cabinet is now Secretary to the Cabinet: Constitution, 1973, Art. 115(1)(d).

The view that the Proposals for Integrated local administration in Zambia originated from the Research Bureau of the Party, enjoyed the support of the Party but were less known and had little support outside that body,¹ calls for comment. That the Proposals were compiled by the Research Bureau of the Party is correct. However, the Proposals were submitted to the Central Committee by the then Political and Legal sub-committee of the Central Committee. The Central Committee referred the Proposals to the Committee on Decentralisation which was composed of representatives from the Party, the Government, trade unions, Churches, Local Government Association of Zambia and parastatal organizations which met under the Chairmanship of Fitz-Patrick Chuula, then Minister of State for Decentralisation. The writer served on that Committee. Figures I and II on the then existing and proposed district administration, respectively, used by Lungu, were contained in the Decentralised Government Proposals for Integrated Local Government, 1978, (pp. 71 and 72). These were devised by the Ministry of Local Government in conjunction with the Committee on Decentralisation. The proposals and the diagrams were distributed to all districts and the Committee on Decentralisation received comments from Local Government councils; most supporting the proposals.

A serious criticism on the introduction of the decentralization in Zambia, however, should be that decentralization being a major policy matter, should have been discussed at the General Conference of the Party.² The Proposals should have been formally adopted by the Conference which conveniently met in September, 1978. The failure to present the Proposals to the General Conference was caused by the opposition from the trade unions and lack of agreement in the Party leadership on the proposed changes. The mood was for postponement of the introduction of the system

1. Lungu, G.F., op. cit., p. 71.

2. UNIP: Constitution, 1978, Art. 70(d) provided that one of the functions of the General Conference of the Party was to "defend and orientate general policies for the nation's development".

of decentralisation contained in the Proposals. Following the Government's failure to pass the Local Administration Bill, 1980, President Kaunda presented the Proposals to the 15th National Council in November, 1980 and pleaded with the National Council in general and MPs in particular, to support the Proposals. The National Assembly subsequently passed the Bill in December, 1980. If the Proposals were 'less known' as alleged, they should not have generated so much timely opposition from members of the general public in general, and MPs, in particular.

Section 3. The Present Local Administration System.

The present local administration system introduced by the Local Administration Act, 1980,¹ (to be referred as the 1980 Act), involves the transfer of staff and finance from the abolished local government councils, plus the establishment of discretionary power at the local level, a form of devolution of power. The scope of the reform is three-fold: the first structure is to foster rural development, the second to improve the provision of basic needs of the people through a uniform system of local administration, and, third, to strengthen participatory democracy in local decision-making; under the umbrella of the Party.

(a) Integration at the Provincial Level.

The basic principle upon which the present system is arranged is of converting UNIP organs at Provincial and District levels into 'local administration' organs performing such functions as are assigned to them by the Constitution of the Party and/or the 1980 Act. Accordingly, sec. 85 of the 1980 Act which constitutes the Provincial Council for purposes of provincial administration, incorporates the provisions of Art. 42 of the Constitution of the Party.² The functions of the Provincial Council as laid down in Schedules I and V of the 1980 Act, are the functions of the

1. Zambia: 1980, No. 15, came into force on 1st January, 1981: Local Administration Act (Commencement) Order, 1980, S.I. 1980/171, Reg. 2.
 2. UNIP: now Art. 47, Constitution of UNIP, 1988 which replaces Art. 42 of the repealed Constitution of 1978 which was in force when the 1980 Act was passed.

Party's Provincial Council as provided in Reg. 64 of the Party Constitution.¹ The Provincial Council is composed of the provincial MCC, as the Chairman, the PPS, as Vice-Chairman, DGs, Political Secretaries, M.P.s, District Chairmen of the Women's and Youth Leagues, one representative from each of the mass organizations, trade unions operating in the Province and from each of the (four) Security Forces.² The Provincial Council is composed of representatives of institutions and it is a non-elective body. The arrangement does not provide for citizen participation. The reason for that is mainly historical: UNIP had never developed provincial Party democracy. The Party's structure and administration below the national bodies centred on the 'Region', which was smaller than the Province but bigger than a district. The deployment of Provincial Ministers between 1964 and 1978 was done within the framework of the Ministry of Provincial and Local Government without any supporting UNIP structures and secretariat. The deployment of Provincial MCCs since 1974 has also not resulted in the establishment of any UNIP independent secretariat at provincial level. The Party operates within the framework of the Government machinery.

Government Ministries and Departments and the Provincial Permanent Secretary operate under the over-all supervision of the MCC who is accountable to the appointing authority, the President on all matters and to the Secretary-General on Party matters. Although the Prime Minister is the head of Government administration, MCCs in the Provinces are regarded as 'senior' Party officials and as such do not take instructions from him or report to him. Consequently, the Party is more informed on the administration of the country than the Government. Although the Provincial Councils' role of formulating and

1. UNIP: now Reg. 46, Constitution, 1988.

2. Zambia: Local Administration Act, 1980, sec. 85(a) to (i).

implementing Party policies is fairly carried out, that of administering the Provinces has been fairly weak. For instance, they have been unable to control 'their' District Councils or border smuggling of essential commodities, or poaching in the game reserves, or illegal mining of precious stone. In fact during the period when the Proposals on the Decentralization system were under discussion, there was pressure to either down-play provincial administration or to altogether abolish it so that the country was divided into Districts only. It was feared that provincial administration would continue to provide an unnecessary super-structure between the Government and local authorities. Border control, for instance, is the responsibility of provincial administration and not District Councils; hence the weakness in the control of cross-border smuggling into or out of Zambia.

The recently adopted Constitution of UNIP shows that provincial administration is being strengthened. The highest organ now is the Provincial Conference, whose composition is larger than that of the previous Provincial Council by the inclusion of members of the Ward Committees.¹ The Provincial Permanent Secretary (a civil servant) is now the Secretary to the Conference. Zambia, however, would be better administered without provincial administration. Abolition of Provinces would go a long way in eliminating 'provincialism', ethnic or tribal identifications which are, to a great extent, influenced by provincial boundaries. The present appointment of the Litunga of Western Province and the Chitimukulu of Northern Province as MCCs and as Provincial MCCs in their tribal Provinces and their heading of provincial administration, makes it difficult to abolish Provinces as these are now turned into influential power bases - mini states. Paradoxically, the bogey which was feared of establishing 'local government' at district level, might actually emerge at provincial level.

1. UNIP:

Constitution, 1988, Art. 46.

(b) Integration at the District Level.

In the previous sub-section it was pointed out that the basic principle in the present local administration system, is the conversion of Party organs into structures of local administration. Accordingly, sec. 10(1) of the 1980 Act incorporates into the Act the provisions of Art. 37 of the Constitution of UNIP which provides for the composition of the District Council, which is as follows:-

- (a) the DG, appointed by the President, as the Chairman;
- (b) the District Political Secretary, appointed by the Central Committee;
- (c) two District trustees, appointed by the Provincial Committee;
- (d) all Councillors in the District, that is all Party Ward Chairmen;
- (e) MPs whose Parliamentary constituencies fall within the District Council area;
- (f) one representative from each of the mass organizations, that is Women's and Youth Leagues and Cooperatives Federation;
- (g) one representative from each of the trade unions operating in the District Council area;
- (h) one representative from each of the security forces, that is the army, the police, prison services and intelligence; and
- (i) one Chief elected by all the chiefs in the District Council area, to represent all the chiefs.

No person can sit on a District Council unless

- (a) he is a member of UNIP,
- (b) he is not disqualified for election to the National Assembly under the provisions of Art. 68(1) of the Constitution of Zambia; and
- (c) the Central Committee of the Party has given prior approval of his membership.¹

This provision requiring prior approval of the Central Committee is applicable only to persons falling within categories (g), (h) and (i) of the members listed above who hold their official posts without the prior approval of the Central Committee.² The rest assume their official posts following formal approval by the Central Committee of the Party. The requirement for formal approval of local government election candidates

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- 1. Zambia: Local Administration Act, 1980, sec. 12(1). Article 37 of the Constitution of UNIP is now Art. 42 of the 1988 Constitution.
 - 2. UNIP: Constitution, 1988, Art. 84 provides that adoption of candidates shall be conducted by the Committee of Chairmen.

was introduced by sec. 11A(2) (i) and (ii) of the Local Government (Amendment) Act, 1975,¹ which also introduced primary elections in local government elections. Primary elections in local administration was not included in the 1980 Act mainly because the present system is not really based on election but institutional representation. Only the Ward Chairman, who becomes the councillor of the ward, is elected. UNIP's policy in local government vis-à-vis qualifications for voters was the same as that for election of members of the National Assembly, namely one-man-one-vote.² That policy was retained under the One-Party system, however, the local administration system restricted the vote to members of the Party Ward Council, that is Party Branch Committee members and these are the people who composed the electorate that elected ward chairmen in 1981. The system was widely condemned as a deliberate attempt to disenfranchise not only non-members of the Party, but all residents in the ward except a handful of members of the Ward Council. The 1980 Act was accordingly amended to broaden the electorate. The electors for the ward chairmen are all members of the Party resident in the Ward.³ The election is, therefore, still a Party affair in which non-members of the Party do not participate although they might live in the Ward.

The view of Mr Lavu Mulimba, a former Minister of State for Decentralization in the Government of Zambia, is that the election of the ward chairman should be seen "first and foremost as an internal matter for the United National Independence Party (UNIP), in exactly the same way as other designated institutions given seats on the District Council are left to decide on the method they will adopt for nominating persons to represent

1. Zambia: 1975, No. 16.

2. Local Government Elections Act, 1970, secs. 14 and 16.

3. Local Administration (Amendment) Act, 1985, No. 17, sec. 3. The registration of voters and the conduct of the election of the Ward Committee is conducted by the Party's Electoral Commission under the provisions of the UNIP's Constitution, 1988, Art. 38.

them on the District Council. For example, the Councillor representing all other chiefs in the district is elected by a Chiefs only electorate."¹ It could be argued that while chiefs and trade unions nominate their representatives on the district council under their own rules and/or procedures, the ward chairmen do not represent members of the Party but all persons resident in the ward; ipso facto, the electorate should be composed of all residents of the ward registered as voters for the purpose of the election of the members of the National Assembly.

Before Independence and during the two-party system, there was great enthusiasm for voluntary Party work among Party officials in UNIP. The introduction of the One-Party system and the bureaucratization of the Party service, witnessed a marked decline in enthusiasm for voluntary Party work. The NCEOPPDZ had anticipated this development when it recommended that Party workers under the One-Party system should be given reasonable financial incentives for Party work.² The provision that the Party ward chairman becomes a ward councillor, is intended to achieve two things, first, it gives the Party a full-time field worker at ward level, and, secondly, it enables the ward chairman to receive a 'reasonable allowance' not from the Party, but from the District Council.³ This arrangement has injected some interest in party work at ward level particularly among the ward chairmen; it has destroyed that voluntary political organization upon which the freedom struggle was founded.

(i) The Status of District Councils.

Under the 1980 Act, the word 'council' means a district council established or deemed to have been established under the Act,⁴

1. See Appendix 'B', Answer to Question No. 3; infra, p. 557.

2. Zambia: NCEOPPDZ, Report, 1972, p. 48, par. 152 and the NCEOPPDZ-SRAG, 1972; p. 25.

3. Allowances paid in accordance with locality of duty from the District Council headquarters: K15 a day (15 Klm) to K50 (30 klm.) and US\$ 110 a day abroad: Local Administration (Councillors' Allowances) Order, 1987, No. 6, Reg. 3 and the Schedule.

4. Local Administration Act, 1980, Sec. 3.

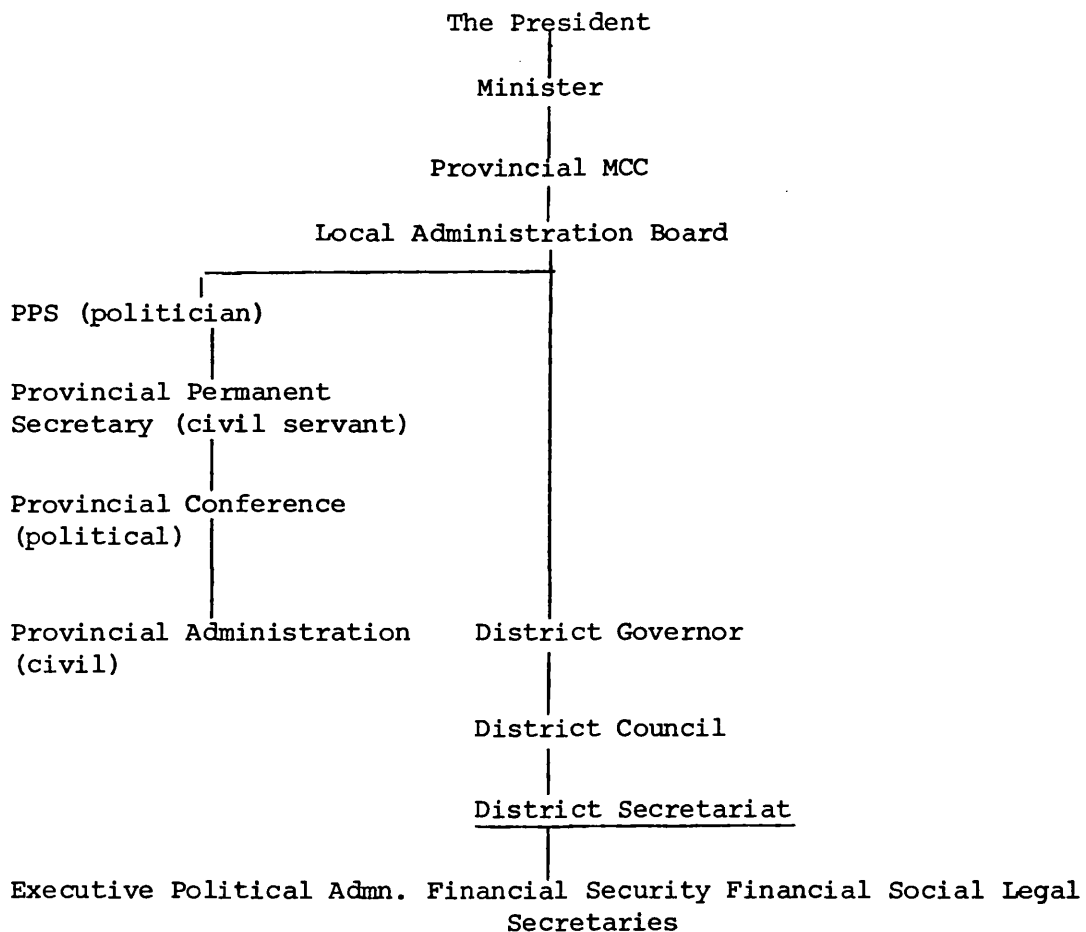
that is, a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name, and with power, subject to the provisions of the Act and any other written law, to do all such acts and things as a body corporate may do as are necessary for, or incidental to, the carrying out of its functions and powers as set out in the Act.¹ This means that although in fact the District Council is constituted under Art. 37 of the Constitution of UNIP, the District Council, the body corporate, is established under secs. 3 and 7 of the 1980 Act. The body corporate is an independent body from that provided for under the Constitution of the Party. Consequently, although UNIP is not included among 'parastatal bodies', that is a statutory corporation or body or company in which the Government has a majority or controlling interest, the District Council is included among parastatal bodies² whose books of accounts can be audited by the Zambia National Audit Corporation.³ The Corporation cannot audit UNIP books of accounts for the reason stated above. This means that the district council provided for under the Constitution of the Party 'disappears' and emerges as the District Council under the Act. It is important, however, to point out that the ward chairmen are not elected under the 1980 Act provisions (which are not there anyway), but under Art. 37 of the Constitution of UNIP, now Art. 42, Constitution of UNIP, 1988.

The local administration system was opposed by many sectors of public life in Zambia, including MPs, public officers and trade union leaders. Local Government officers' fears of Party interference was unrealistic in that Party interference had began as early as 1968 with the deployment of DG in district administration. Trade union opposition was based on selfish ends in that some unions, for instance the MUZ, feared that conversion of Mine Townships Boards into District Councils would

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1. Zambia: Local Administration Act, 1980, sec. 7.
 2. Zambia National Audit Corporation Act, 1982, No. 32, sec. 2
 3. ibid. sec. 6

extend the jurisdiction of the mining townships authorities and consequently extend social and welfare facilities intended for miners to persons not engaged in the mining industry. That was an attempt to deny fellow-Zambians not engaged in the mining industry the fruits of industrialization. The MPs' fears were mainly influenced by reports that such a system of local administration had 'failed' in certain African countries; in particular, Tanzania. The present local authorities system is structured as follows:-

FIGURE II: Present Provincial and District Administration.¹



1. UNIP:

The Provincial Conference and Council delegate administrative functions to the Provincial Committee comprising of the Provincial MCC, PPS, Provincial Permanent Secretary, DGs, one representative from each of the Defence and Security Forces and Provincial Chairmen of the Women's and Youth Leagues and Provincial Co-operative Union: Constitution, 1988, Art. 48.

The diagram on the previous page shows that provincial and district administration are both dominated by Party functionaries, all appointed by the President. In essence the 1980 Act establishes Party control of provincial and district administration. However, among the nine Secretaryships in the District Council secretariat, only one is held by a politician, the Political Secretary, who is appointed by the Central Committee (now the Committee of Chairmen). The rest of the Secretaries are either civil servants or officers employed by the District Council.

(ii) Status of Local Administration Personnel.

The 1980 Act provides for the merger of Party and governmental organs at the district level in order to create an integrated administrative structure, the District Council, in each of the fifty-five districts.¹ Each Council acts through a district secretariat comprising former central government field officers and local government officers, constituting a single unified national public service, and, Party officials. Persons employed in the abolished local government service on coming into force of the 1980 Act, were, as a transitional measure, deemed to have been seconded to the Civil Service for a period of not less than three years and not more than five years, and at the expiry of the maximum period, they were deemed to have voluntarily transferred to the Civil Service unless during that period they gave notice to the Public Service Commission stating that they did not want to transfer and should be retired in the public interest.² There were no reported cases of such retirements. The maximum period was later extended to six years;³ thus, by 1st January, 1987, all such officers should have transferred to the Civil Service. The permanent arrangement is that a contract of service entered into prior to 1st December, 1986, between a local authority officer and the Public Service Commission, is deemed to have been made between such a public

1. Infra, p. 383 (footnote No. 3).

2. Zambia: Local Administration Act, 1980, sec. 91(2).

3. Local Administration (Amendment) Act, 1985, No. 17, sec. 2(a) and (b).

and the local authority concerned.¹ There is now established the Local Administration Service covering all persons employed by and receiving a salary or wage from a local authority.² The local authority has the power of recruitment, inside or outside Zambia, appointment, promotion, transfer of officers and their dismissal. Any officer aggrieved by the decision of a local authority may lodge his appeal with the Provincial Service Board whose decision is binding upon the parties concerned but subject to appeal to the High Court.³

Under the 1980 Act an 'officer' of a council means a public officer employed in a permanent establishment (the Minister for decentralization decides which posts should be classified as permanent) of a council and an 'employee' means a person employed by a council other than an officer. A 'councillor' on the other hand, means a member of a council who is neither an officer nor an employee.⁴ The appointment of the District Secretaries was delayed for nearly two years following the introduction of the decentralized system of local administration because the Central Committee could not approve the deployment based on 'home districts' arrangement. Mr Mulimba, afore-mentioned, explains that the arrangement was intended to post Secretaries to districts where they could combine the advantage of knowing the local language and areas well.⁵ Ironically, it were the officers themselves who in the majority of cases objected being deployed in their tribal districts. The Central Committee intervened and deployed Secretaries in any district irrespective of their ethnic origin. The localized recruitment and appointment into the Local Administration Service will inevitably result in 'home-boy'

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1. Zambia: Local Administration (Amendment) Act, 1987, No. 21, sec. 3 and Reg. 4(1) of the Local Administration Service Regulations, 1987, No. S.I. 1987/101.
 2. ibid. sec. 3, and Reg. 5, respectively.
 3. ibid. sec. 92 and Reg. 35(1), respectively.
 4. Local Administration Act, 1980, sec. 2
 5. See Appendix 'B' Answer to Question 2; infra, p. 555.

appointment. Some of the conservative District Councils, e.g. those in the Southern Province previously dominated by the ANC, would welcome secretariat personell appointed locally and without Party interference.

In January, 1982, President Kaunda appointed sixteen MPs as DGs and deployed them as DGs within their Parliamentary constituencies.¹ There were three main reasons behind this experiment; first, it was the President's response to the criticism made in Parliament and elsewhere during the passage of the 1980 Act, that the Act provided for the chairmanship of District Councils by unelected persons, namely the DGs. Secondly, it was a cost-saving measure in that it resulted in a large number of DGs being retired. The MP-DGs receive only one salary (from Parliament) and only allowances from the District Council in accordance with the Leadership Code.² Thirdly, it was anticipated that people would assume that an MP-DG would be more responsive to their demands than an ordinary DG. Members of Parliament and DGs are all politicians; all aiming at becoming PPS, Ministers or MCCs and accordingly they are often concerned with satisfying the expectations of those in the top leadership than those of the people they represent in the National Assembly or they are appointed to serve. The MP-DGs have not, therefore, performed differently from the ordinary DGs.

Although the District Council is a body corporate, UNIP's role is assured through the chairmanship of the Council by the DG and the presence of the Ward Chairmen and District Trustees³ and to some extent of the MPs most of whom are strong supporters of the Party. The integrated administrative system has not blurred the distinction between the public officer and the politician, but the relationship between the Party and the District Council has been brought much closer together than before, e.g. District Councils are now responsible for providing funds and office

1. Times of Zambia; 19th January, 1982.

2. Zambia: Leadership Code, S.I. 1976/88, Reg. 33; supra, p. 269.

3. UNIP: Constitution, 1988, Art. 42(1).

accommodation for the Party's District Political Committee.

The system of appointment of officers in the local administration system is different from that followed in the civil service, e.g. the appointment into the Civil Service by a single centralized authority, the Public Service Commission. The appointment of officers by each District Council might not bring about the projected 'single national public service'.¹ The appointment of officers by each District Council might vindicate the fears expressed by public officers in 1979-80 of possible political interference in the appointment in the local administration service. The present local administration system is, however, yet another example of a development in which UNIP has utilized the law to achieve its central role. The pattern of the leading role of the Party at the district level is similar to that at the national level, namely through the deployment of Party functionaries in a dominant position in the system, e.g. the DG's chairmanship of the District Council. That, together with the composition of the District Council, have significantly changed the nature of 'local government' in Zambia. Under the present system Party and Government decision-making is dominated by the appointee of the President, the DG.

(iii) Vicarious Liability of District Councils.

Since a District Council is a body corporate, capable of suing and being sued in its corporate name,² it has legal capacity at law. A District Council can act only through persons in its service. The basis of vicarious liability is not wrongful-doing or wrongful command of the local authority, but, simply founded upon the principle of public policy requiring that an employer or master who obtains the benefit of his servant or agent should hold the rest of the world harmless from the servant's or agent's lawful activities.³ Accordingly, no logical opposition or difficult need

1. UNIP: National Policies for the Decade 1985 - 1995, Aims and Objectives of the Third Phase of the Party Programme; 1985, p. 14.

2. Zambia: Local Administration Act, 1980, sec. 7.

3. Houldsworth v. City of Glasgow Bank (1880) 5 AC 317 at p. 326.

prevent a statutory corporation from being liable to compensate any person injured by its servants or agents while acting in their employment, even in cases where a tort committed required as one of its elements the presence of malice.¹ English decisions have gone as far as to hold that a statutory body may be liable for torts committed by its servants when engaged in an undertaking which was ultra vires the corporation.² An officer or employee of a District Council is not personally liable in respect of any act done by him in the execution or purported execution of his functions under the Act or any other written law.³ That, however, does not mean that the Council is relieved of its vicarious liability in respect of the acts of its officers and/or employees. The Councillor is neither an officer nor an employee of the District Council; consequently, if a ward chairman were to commit a tort, e.g. allegedly defamed someone at a UNIP or a District Council meeting, or, in his official correspondence, the Council would not be vicariously liable. The Party, on the other hand, due to want of legal capacity, cannot be sued in its name or joined as a co-defendant.⁴ The Councillor can be sued personally. The DG can be sued in his personal capacity or through the Attorney-General, in his official capacity, being an appointee of the President.

There has been no court case so far on the relationship between the DG and the Councillor on one hand, and, the District Council, on the other hand. What has been stated said above is, therefore, based on mere speculation of what the courts are likely to decide.

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1. Citizens' Life Assurance Co. v. Brown /1904/ AC 423. A local authority may be liable in defamation: De Buse v. McCarthy and Stepney Borough Council /1942/ 1 KB 156.
 2. Campbell v. Paddington Corporation /1911/ 1 KB 869.
 3. Zambia: Local Administration Act, 1980, sec. 77.
 4. Chipimo v. Chona, Secretary-General of UNIP and Attorney-General (1983) ZR 125; supra, p. 249.

(iv) Challenging Local Authorities' Actions.

The general principle of law is that local authorities should act lawfully only through their delegated legislation and that everything done outside their statutory powers is ultra vires. The statutory powers are often granted in wide terms thereby allowing local authorities room for manoeuvre in the implementation of their policies, projects and programmes. The challenge of local authorities' actions can be with regard to matters that are expressly provided among the functions of the local authorities, or to matters implied or incidental to the express statutory powers or where it is alleged that the local authority has exceeded its statutory powers. There are three main methods by which an act of a local authority might be challenged:

- (a) by an application for judicial review in the High Court, e.g. by an application for a declaration or an injunction, topics already covered in Chapter V;
- (b) indirectly where an individual is prosecuted in a criminal court for alleged failure to comply with some order, notice or licence: the individual may attempt to avoid conviction by establishing that the order, notice or licence as the case might be, was ultra vires the Authority so that he could not be convicted for failure to comply with something which did not exist in law;¹
- (c) by means of audit, where an auditor finds that an item in the local authority's accounts is contrary to law. If this finding is confirmed on application to the High Court by the auditor (or person aggrieved by the surcharge) the amounts involved may be surcharged to the members responsible.²

Control of local authorities by courts is crucial, but that is on rare occasions. In practice, great deal of control is exerted over local authorities by the Ministry of Decentralization in particular and the Party in general. The former's control is in the area of finance, while the latter's control is in the political area concentrated on the role of the DG in his capacity as Chairman of the District Council.

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- 1. Zambia: Local Administration Act, 1980, sec. 59, criminal offences can be created through By-Laws; penalty limited to K600 and/or six months imprisonment.
 - 2. ibid. secs. 40 (on audit report), 41 (powers of disallowance and surcharge), and, 42 (appeals against disallowance and surcharges.)
 - 3. Supra, p. 352.

The Commission for Investigations - the office of the Investigator-General (the Ombudsman) - exercises some control of local authorities. The Ombudsman is empowered to inquire into the conduct of any person or member in the service of a local authority in the exercise of his office, authority or in abuse thereof.¹ The role of the DG and the Ward Chairman can be investigated by the Ombudsman, however, all the Ombudsman can do is to make a recommendation to the President. It is the President who can reprimand a DG for reported abuse of office. Local Authority officers are often summoned to appear and have appeared before the Investigator-General to explain their actions or that of their subordinates complained against either by a member of the public or an employee of the Local Authority.

The role of the Investigator-General is more effective in investigating complaints against local authorities than with the inquiry into allegations against the Party and the Government: the latter are sensitive to investigation on the grounds of Party or State secrecy or security. The whole range of security matters are placed outside the area of investigation by the Ombudsman. District Councils are empowered to administer the affairs of their district in matters touching on politics, economics, science and technology, social and culture and defence and security. However, although District Councils are said to be responsible for defence and security in their area,² in reality defence and security are matters for the Government: District Councils have no armies or police force or intelligence service of their own, except for the Secretary for Security.³ In most cases, however, most people aggrieved by actions of the DG, the Ward Chairman or an officer of a District Council, are not aware of the existence of judicial review procedures or of the office of Investigator-General that can 'defend' their rights or interests when

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| 1. Zambia: | Constitution of Zambia Act, 1973, Art. 117(4)(c). |
| 2. | Local Administration Act, 1980, sec. 43, Schedule, Part I, 15. |
| 3. | <u>ibid.</u> sec. 83(2). |

threatened or infringed by a decision or action of a local authority. Consequently, some questionable decisions or actions of local authorities go unchallenged, e.g. demolition of 'squatter' houses.

The Party Control Commission has been assigned a number of functions, however, the Constitution of the Party in this regard does not expressly refer to 'local authorities', instead reference is made to 'the Party, Government and parastatals'¹ as the institutions whose functions shall be subject to the scrutiny of the Commission. Legally the phrase does not include local authorities. It is most unlikely that the Party intended that local authorities should not be subject to the monitoring of the Party Control Commission. The Zambia National Audit Corporation Act, 1982,² defines a 'parastatal body' to mean a statutory Corporation, body or a company in which the Government has a majority or controlling interest, and includes a local authority.³ In the context of such legislation, it could be argued that the Party Control Commission has jurisdiction over local authorities. The Commission is empowered to, inter alia, monitor and ensure that the Party, Government and parastatals understand and actively implement Party policies, decisions, plans, directives and programmes. The Commission can require any person in charge of a local authority department to produce or furnish any document under his control, or answer questions concerning the duties of any other public officer or other person or call any official before it whose performance or that of his enterprise or subordinate is below expectation and shall draw the same to his attention and to the attention of the appropriate authority as to the action that may be taken.⁴ In accordance with these provisions, local authority decisions or actions could be open to challenge through the Party's Control Commission. It remains to be seen how the Commission will carry out its inspection functions.

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1. UNIP: Constitution, 1988, Art. 70(1) (a) to (h).
 2. Zambia: 1982, No. 32.
 3. ibid. sec. 2.

(v) Prospects for the Integrated Local Administration.

District Councils as bodies corporate, can perform only those functions delegated to them by legislation and cannot therefore, assume responsibilities or powers, or functions etc., which are not assigned to them by the 1980 Act. District Councils have ample legal powers to discharge their scheduled functions, and, in addition to that they are allowed to do 'anything necessary for or incidental to the discharge of any function conferred' on them by the 1980 Act. The scheduled functions are numerous and include general administration of the council area; agricultural and forestry undertakings; communication, traffic and streets; community development, public health; acquisition and maintenance of land and buildings; provision of social amenities and education; allocation of trading facilities, water and sewage. Local authorities receive Government funds to enable them carry out these functions. In addition to that they raise their own revenue through rates, rent, charges, fees and borrowings. The criticism that local authorities are unable to borrow money because there are no lending institutions in District Council areas, save the post office,¹ is not supported by the fact that almost all commercial and State lending institutions have branches outside Lusaka, the capital; for instance, Barclays Bank had 32 branches, Zambia National Commercial Bank, 30, Standard Bank, 23, Grindlays Bank 6 and the State lending institutions such as Development Bank of Zambia, Zambia National Building Society, Zambia Provident Fund and the Lima Bank have branches in most centres of commerce. Each of these institutions reported to Bank of Zambia substantial lending to local authorities mainly for housing, water and road construction.²

The aspiration of any people can be summarised as the need for improved quality of life manifested through appreciable improvement

1. Lungu, G.F., op. cit., p. 73

2. Zambia: Bank of Zambia Research Bureau of Annual Reports of Commercial Banks and Lending Institutions, 1980-81; See also UNIP's A Review of the Implementation of the National Policies for the Decade 1974-84; 1984, p. 141.

in the quality and amount of social services such as education, employment, health and housing. In the developing countries such as Zambia such facilities can be supplied mainly by the Government through local authorities, the local authorities themselves and the people through self-reliance. The need for self-reliance projects at local level arises from several factors, and among these is the fact that although the majority of the people in Zambia live in rural areas, both the colonial and post-independence governments showed much concern and interest in the development of urban than rural areas. Self-reliance creates self-confidence and no one institution can do more for the promotion and sustenance of a community than the people themselves. The role of UNIP has been rather weak in leading the rural people in self-reliance projects. Rarely is it reported that a UNIP leader has spent a day helping villagers engaged in self-help project. The spirit of self-reliance is lacking among the majority of the Zambian people and ward chairmen are often men devoid of initiative and only appeal for funds from the Government for every project.

The local administration system adopted in Zambia under the 1980 Act was to some extent influenced by the local administration system adopted in Tanzania following the introduction of a One-Party system, under which every council, urban or rural, was placed under the chairmanship of a TANU official, ex-officio. Government nominated councillors dominated the council membership in the same manner that non-elective seats are allocated to Party and Government officials on the Zambian District Council. There was also a pre-election of elected members by TANU,¹ that is a form of primary election. The revolutionary Tanzanian system necessitated the posting of senior Party and Government officials to Regions (similar to Zambian Provinces) and resettlement of persons in collectives called ujaama settlements.² The system which was

1. Mawhood, P., Local Government in the Third World; John Wiley & Sons, 1983, p. 91

2. Tanzania: See, Ujaama Villages (Registration, Designation and Administration) Act, 1975

development oriented, was based on 'local administration' at the upper level of the regions and districts, there were three institutions; the Regional Commissioners, TANU Branches and District Development Committees.

The Tanzanian system appears not to have worked well, and, as a consequence local government was re-constituted in 1982 to what it was at the time of independence. Some of the changes included the re-introduction of a majority of elected members on district councils, thus moving away from the bureaucratic representation and nomination on development committees and ex-officio mayors, chairmen and chief executive officers. The CCM representation is retained but reduced and not as the dominant component on the councils. One of the reasons that caused some opposition to the introduction of the local administration system in Zambia in 1980, was that Zambia was adopting a system of local government that was reportedly failing and was being discarded by CCM.

What are the prospects of the local administration system introduced in Zambia by the 1980 Act? This question will be answered only in relation with the prospects of the Councils on their own, or in regard to their relationship with the Party, the Government and the parastatal organizations.

(c) District Councils on their own.

The integrative provisions of the 1980 Act go beyond the assertion of the supremacy of the Party or implementation of the national ideology of Humanism: they are intended to achieve social, economic and political development and national security. The 1980 Act established an unrepresentative local council system, dominated by ex-officio members, an arrangement found unworkable in Tanzania; now abandoned. Mr Mulimba's reply to one of the questions put to him on the local administration in Zambia,¹ makes the point that the distinguishing characteristic of local

1. See Appendix 'B', Answer to Question No. 8; infra, p. 567.

administration is its 'localness'. The rural local authorities and local government authorities which existed during the colonial era in NR were based on the principle of 'localness' in that the district commissioner, the district magistrate, the village and township management board and municipal corporation operated under local officials or residents. But they lacked local representativeness, for instance, by the exclusion of Africans from councils or boards. The present system re-introduces non-representative councils. The ward chairmen are petty bourgeois cliques who have remained in Party offices unchallenged for many years. Given the control by the Party hierarchy over the selection of ward chairmen, the lower Party officials who are chosen to fill those posts are more concerned with impressing their political superiors on their fitness for office of leadership and probably promotion, than with the social and economic problems of their wards. The prospects for a bold and effective representation of the ward is therefore, negligible. Since the Central Committee approves the candidature of every person seeking election as a ward chairman¹ in the same manner it approves the candidature of candidate for the National Assembly,² there should be no fear that ward chairmen elected by the general electorate would be less sympathetic with Party policies or programmes at grass-roots level. District Councils' performances will continue weak as long as they remain undemocratically constituted.

(d) Relationship with the Party.

District Councils are structural entities of the Party and their success or failure or effectiveness or otherwise, is tied up with the role of the Party. They implement Party policies, coordinate

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1. Zambia: Local Administration Act, 1980, sec. 12(1)(c).
 2. Constitution of Zambia Act, 1972, Art. 75(5) as amended by the Constitution of Zambia (Amendment) Act, 1983, No. 1, Art. 75(3)

and promote Party work. As corporate bodies, District Councils are required to carry out their statutory functions only subject to Parliament and independent of the Party. The Chairmanship of District Councils by the DG, who is required to carry out such functions as are assigned to him by the President and the Central Committee of the Party, means that there is a day-to-day close relationship between the Party and District Councils. There is no room for political conflict between the Party and District Councils as presently constituted. Devoid of popular participation, District Councils have become institutions for recruitment of new leadership and political 'socialization' while entrusting the task of decision-making in the DG. In practice there is centralization of decision-making power in the DG who is the President's personal appointee and representative at district level.

(e) Relationship with the Government.

The relationship between the Government and local authorities is both unclear and unsatisfactory.¹ The dissatisfaction is caused by the presence of provincial administration departments whose main role is that of referring district matters to Government Ministry headquarters. The Government's view is that District Councils' performances have been so poor that the Government is reluctant to assign more power to them.² The past seven years of local administration system have shown that some local authorities and provincial permanent secretaries were not ready for additional responsibilities. For instance, the Minister for Decentralization told a recent conference of District Council councillors that some Councils had failed to pay their workers or having their accounts audited unless the Ministry

1. See Appendix 'B', Answer to Question No. 8, p. 567.

2. Zambia Daily Mail; 17th May, 1988: 'Inept councils worrying, says minister', p. 5.

headquarters stepped in. Councils which failed to pay their workers could not be trusted and given more responsibility, for instance, to pay teachers and civil servants in their service, their salaries, because they might abuse it. Because of shoddy performance, Government retains overall supervision of District Councils through the Ministry of Decentralization. The relationship between District Council and the Government is not as cordial as that between the Councils and the Party. One of the causes of the conflict between the Government and District Councils is the DG's refusal to be subordinated to Government officials such as Ministerial Permanent Secretary or Provincial Permanent Secretary Under-Secretaries and Assistant Secretaries whose ministries and departments operate within the District Council area. District Governors, who are junior officials in the Party, purport to dominate every institution in the district on the ground that they are Presidential appointees, and, refuse to be accountable to any other person except senior political leaders such as PPS, provincial MCC, the Secretary-General or the President himself. The conflict between the District Councils and the Government arises from the somewhat 'jack-of-all-trades' role of the DG. Until and unless that is sorted out and the powers and functions of the DG are spelt out, the relationship between the Government and District Councils will continue tense and unsatisfactory.

(f) Relationship with Parastatal Organizations.

The relationship between 'parastatal bodies' (a terminology which sometimes includes local authorities)¹, is governed by their statutory powers and functions. District Councils have power to issue, grant or revoke trading licences of companies and parastatal bodies operating in their district area. They allocate land and/or business or trading premises to parastatal organizations. There is, therefore,

1. Zambia: Zambia National Audit Corporation Act, 1982, No. 32, sec. 2, supra, p. 372.

close working relationship between these two institutions. However, parastatal organizations are not represented in Party organs. The recent appointment by President Kaunda to the Central Committee of parastatal organizations chief executives,¹ was not based on any provision of the Constitution of the Party. Parastatal organizations are not represented on District Councils : a missing essential link between District Councils or District Development Committees and parastatals operating in the district council area. Parastatal personnel should otherwise assist District Councils in the formulation and evaluation of their economic strategies. In the urban areas, parastatal organizations send their periodic and/or annual reports to the District Councils usually at the request of the District Councils. In the rural district council areas parastatal bodies operate simply as commercial enterprises without any formal working relationship with the District Council of the area of their operation.

The poor performance of Zambia's economy and the chronic shortage of foreign exchange during the period 1973-1989 adversely affected the role of the public sector. Parastatals' economic activities have been on the decline. Low production of agricultural commodities such as maize, groundnuts, cotton, sun-flower etc., has resulted in parastatals concerned with the storage and transportation as well as processing of these commodities, to close down some of their depots or offices in many districts. Some District Councils are assuming some of the functions which were abandoned by parastatal organizations.

Notwithstanding the egg-shell legal status coating the District Councils as bodies corporate, they are in fact UNIP organs and their relationship with any other institution is depended on the policy of the Party. In the absence of a clear policy on the relationship between UNIP and parastatal bodies, the relationship between these organizations and District Councils could hardly be clearer.²

1. See supra, pp. 227 - 228

2. Supra, p. 223.

Section 4. The Role of the Party at Grassroots Level.

The nerve ends of any political organization is at the interface between the party and the general public; members and non-members of the party. The character of that interface determines the effectiveness of the party's role in the community. The major difference in the role of UNIP at the national and the district levels and its role at the grassroots level, lies in the fact that in the former the Party merely deploys its leading cadres in certain institutions established under the Constitution of Zambia, while in the latter, the Party operates through organs established under its own Constitution. Under the One-Party system UNIP's functions at the grassroots level are legion compared to its role during the multi-party system. This Section, however, looks at the membership of the Party which is effected at the grassroots level, Party organization below the District and the role of UNIP in the maintenance of law and order at the grassroots level.

(a) Membership of the Party.

The Government of Zambia (UNIP) accepted the recommendations of the NCEOPPDZ on the membership of the Party under a One-Party system and among these recommendations was one that membership of the Party should be voluntary and open to any Zambian citizen who accepted the objectives and rules of the Party.¹ That recommendation was similar to that made by the Presidential Commission on the Establishment of a One Party State in Tanzania which rejected the idea of TANU as an elite group and recommended mass participation in the affairs of the Party.² These recommendations were merely confirming the fact that TANU or UNIP was historically a mass organization and the One-Party system was not to change that characteristic. The legislation which introduced the One-Party system in Zambia

1. Zambia: NCEOPPDZ, Report, 1972, p. 48, par. 154 and the NCEOPPDZ-SRAG, 1972; p. 26

2. Tanzania: Report of the Presidential Commission on the Establishment of a Democratic One Party State; 1965; Appendix IV, Part I, IV (1) and Part II (36) to (38)

provided for a non-elite membership of UNIP as follows:-

12(1) There shall be one and only one political party in Zambia, namely the United National Independence Party (in this Constitution referred to as 'the Party').

(2) Every citizen who complies with the requirements laid down, from time to time, by the constitution of the Party, shall be entitled to become a member of the Party.¹

The provisions of sec. 12(2) quoted above, were omitted from the provisions of Art. 4 of the Constitution of Zambia Act, 1973, which now contains the One-Party Constitution of Zambia. The Constitution of UNIP, however, provides that

Membership of the Party is voluntary and open to all politically conscious and active Zambian revolutionary peasants, workers, students and progressive intellectuals who accept the philosophy of Humanism and the Party's policies and programmes of action.²

The requirement that applicants for membership of the Party should be persons who accept the philosophy of Humanism, does not hinder persons from joining the Party mainly because the Party is anxious to enrol as many members as possible and hardly rejects any applicant on the ground of him being ignorant of the philosophy. In practice membership of the Party is open to all Zambians above the age of eighteen years. Under a One-Party system a citizen who is interested in politics has to join the only available political organization. The system obviously restricts the right of those who, for whatever reasons, do ~~not~~ want to join the ruling party, to form or belong to any other party. Consequently, only members of UNIP can contest an election or can be nominated to an office which is open only to members of the Party, e.g. the National Assembly or the District Council. However, non-members of the Party participate in political affairs of the country, e.g. they can vote in Presidential and Parliamentary elections.³

The One-Party system adopted in Tanzania and Zambia has not turned CCM and UNIP, respectively, into 'vanguard parties', that is,

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1. Zambia: Constitution (Amendment) (No. 5) Act, 1972, No. 1.
 2. UNIP: Constitution, 1988, Art. 10.
 3. Supra, pp. 144 and 294, respectively.

political organizations whose membership is selective and restricted to a few dedicated ideologically tested persons. That is the model of the political organization first given legal backing by Art. 126 of the USSR Constitution of 1936 which guaranteed to Soviet citizens 'in conformity with the interests of the working people', the right to unite in mass organizations; the most active and political conscious citizens voluntarily unite in the Communist Party which was the vanguard of the working people, the 'leading core of all organizations of the working people, both governmental and non-governmental'.¹ Although the Constitution of UNIP talks of the membership of the Party being open to 'revolutionary peasants, workers and intellectuals', in practice the recruitment for membership is open to all Zambians. In fact the problem has not been whether the membership of the Party is or is not open to all Zambians, but whether people should be compelled to join the Party. 'Freedom of association and assembly', includes the freedom not to belong to an organization, hence the emphasis made during the multi-party era in Zambia that persons should not be forced to belong to any party.

For instance, provisions of the Cane-Farmers' Incorporation and Cess Act, 1965, as amended in 1973, of Trinidad, provided for compulsory membership in the Trinidad Island-Wide Cane Farmers' Association Inc. In Attorney-General v. Prakash Seereeram,² it was contended, inter alia, that that provision of the Act infringed Art. 1(j) of the Constitution of Trinidad and Tobago,³ which protected freedom of association and assembly. The Act provided for compulsory membership of the Association and conferred on the Association the sole

1. Loeber, D.A., (Ed.) Ruling Communist Parties and Their Status Under Law; Martinus Nijhoff, Dordrecht, 1986, p. 439.

2. (1975) (unreported) Civil Appeals Nos. 11 and 14; cited by Okpaluba, C., in "Constitutional Guarantee of Freedom of Association", PA, (1977), p. 217.

3. UK: Trinidad and Tobago (Constitution) Order in Council, 1962, S.I. 1962/1875, repealed by the Republic of Trinidad and Tobago Act, 1976, No. 4.

bargaining rights on behalf of all cane-farmers notwithstanding the presence of relevant trade unions. Seereeram's contention was that because of the provisions of the 1965 Act, he could not exercise his fundamental right of not belonging to an association. The State's response to that was that the freedom of association guaranteed by the Constitution was not absolute and that when the State sought to regulate a business such as the sugar industry of Trinidad and Tobago (the 'sugar-belt'), there can be no infringement of the fundamental right to associate and assembly if the State required a person engaged in that industry to be a member of the Association. Rejecting the State's contention, the Court observed as follows:-

If this contention is correct it seems to me that this can be a mortal blow to the heart of the democratic process in the country because citizens may find themselves being compulsorily to join religious associations, commercial corporations, trade unions, trade associations and even political parties under the guise of regulating the affairs of some particular activity. Bearing in mind that a constitutional instrument must not be construed in a narrow and pedantic sense, I would have thought that the only implication to be drawn from the words 'freedom of association' is that a person should be free to join with others and not compelled to do so.¹

The One-Party system is contrary to freedom of association and assembly as enjoyed in some democratic states, first, because it obviously denies the citizens the choice to belong to another or other political party or parties, and, secondly, by implication, it compels citizens to join and belong to the only available political organization. Membership of UNIP, however, is voluntary and consequently, many Zambians have opted not to join the Party. In 1983 the membership was 461,219 spread throughout 55 Districts², 1,177 Wards, 5,010 Branches and 36,329 Sections.³ The term 'UNIP' or 'the Party' includes the Women's and the Youth Leagues and the

1. Attorney-General v. Prakash Seereeram; op. cit., per Rees, JA, at p. 223.

2. There is an ungazetted and disputed 56th District of Chizera, North-Western Province, which local ethnic factions have disagreed on the citing of its Boma - the District headquarters.

3. UNIP: Secretary-General's Annual Report, 1983; p. 30.

Young Pioneers although these wings of the Party operate under their own separate constitutions and maintain their own membership records. The membership of the Women's and Youth Leagues in 1983 was 159,422 and 102,325, respectively. There are two important points to be made regarding these membership figures, first, young persons (i.e. persons between 18 and 35 years of age) can join the main body and the Youth League or Women's League, if female, and thus being liable to be counted twice or thrice, and, secondly, membership of main body UNIP is, once secured, for life.¹ The membership figures reflect the number of persons who paid their annual membership subscriptions. The average annual active membership of UNIP should, therefore, be around 730,000 members out of an adult population of around four million Zambians.

Depending on how one looks at that membership of the Party, one could conclude that the figure confirms the point that the One-Party system leaves a large segment of the population 'politically frustrated', that is, without an alternative form of political organization. The figures might also be seen as a confirmation that membership of the Party is voluntary otherwise if it were compulsory, it could be higher. Still further, it could be argued that the membership shows that the One-Party system does not enjoy the support of the majority of the inhabitants. There is no evidence that the membership is low because the Party is being run as a vanguard party; there has been no case of a Zambian being refused membership of the Party.

Some Causes for Low Party Membership.

The introduction of the One-Party system made the Party ignore the difference between the administration and organization of the Party; emphasis was placed on the bureaucratization of the Party administration at the expense of Party organization, particularly at the

1. UNIP: Constitution, 1988, Art. 11; membership lapses if annual subscription is not paid.

grass-roots level. Party administrative functions were centralized. For instance, all Party finances were controlled centrally by the Party headquarters in Lusaka. In most districts delays in payments for goods and services rendered to the Party occurred and resulted in the Party being refused fuel or repairs to vehicles. Besides being an embarrassment to the Party organizers, such incidents grounded Party organization and adversely affected membership campaigns.

Secondly, the establishment of a full-time Central Committee in 1974 necessitated the establishment of a Party Service which resulted in the deployment of a large number of highly paid civil servants. That affected the erstwhile spirit of voluntary political organization which was the birth-mark of African political mobilization from the days of the native welfare associations of the 1930's and of the NRANC and ZANC in the 1940's and 1950's.¹ After the introduction of the One-Party system Party work came to be looked upon from the point of view of financial benefits and high office. Field workers are unwilling to organize gratis. Consequently, voluntary membership drive has lessened. The deployment of civil servants in Party service (from the District up to the Central Committee) has created a sense of withdrawal among the old Party stalwarts who seem convinced that they are being regarded as being intellectually ill-equipped for organizing the Party under the One-Party system. In their withdrawal, they seem to say, 'well, let the intellectuals come and organize the Party even here in rural areas'. The 'intellectuals' have tended to be office-bound, unaccustomed to tough political field work. This has resulted in stagnation in Party membership and Party organization; consequently, a decline in the effectiveness of the Party.

Thirdly, most citizens publicly question the usefulness of the membership of the Party under a One-Party system. The leading role

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Supra, pp. 58 and 61.

of the Party is seen as the domination of society by a handful of Party officials whether they were supported by the majority of the citizens or not. Such talk has contributed a great deal to the apparent lethargy in Party membership mobilization. Some members of the public 'see no point' in joining the Party as they cannot influence the entrenched Party policies, including that of the One-Party system itself. This feeling that UNIP belongs to a clique of politicians, has been criticised by President Kaunda who has said that

UNIP belongs to no one person, not even to the most active members of it. It does not even belong collectively to the members alone. It belongs to the whole people, even those who are not members so long as they are people of Zambia. Every Zambian is a shareholder in this institution. They have all entrusted the welfare of their lives to it. No one owns UNIP and no one can take it away from anyone. For our sake, we must all support the survival and active role of UNIP as part of us.¹

The gist of this statement is that no one section of the population should dominate the leadership or membership of the Party and that a collapse of UNIP would destroy the prevailing national unity. The statement does not mean that membership of the Party does not matter as long as one was a Zambian citizen. There are times, many times, when the Zambian citizen is required to show his/her 'shareholder's certificate' in this institution. For instance, President Kaunda himself once told a UNIP National Council that he was 'shocked' when he discovered that some Zambians he had appointed as High Commissioners and Ambassadors did not, at the time of their appointment, possess UNIP membership cards.² He accordingly directed that, first, these should not leave the country unless and until they were in possession of membership cards, and, second, that in future no person sent to a Zambian foreign mission should leave the country without a valid membership of the Party.

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1. UNIP: Blueprint for Economic Development (A Guide on How to Clear Obstacles); 14th National Council, 8th October, 1979, p. 26. Emphasis supplied.
 2. 6th National Council, 30th June-3rd July, 1975.

Such directives have the effect of compelling people to become members of the Party. This point will be considered together with the fourth reason why some Zambians refrain from joining the Party. Some are genuinely opposed to some policies of the Party, for instance, Socialism or socialist economic programmes. Others, such as Watch Towers and Lumpas are just opposed to politics in general. The Constitution of Zambia provides that no law should make any provision that is discriminatory in itself or its effect, and, 'discriminatory' means affording different treatment to different people attributable wholly or mainly to their respective descriptions by race, tribe, place of birth, political opinion, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.¹ It is pertinent to note that the restriction is only applicable to law that is discriminatory. Practices such as the President's requirement that only persons in possession of Party cards should be sent to work in Zambian missions abroad, is not covered.

All 'classes' are represented in the membership of UNIP, although the majority are general workers, market women, peasants and the youth.² It is these that wear Party colours, wave flags, sing and dance for the leaders and make up the bulk of the Party militants. The 'revolutionary' intellectuals and businessmen and women tend to come into the Party membership through Presidential nomination or 'tribal push', that is, those who are encouraged to enter into Party leadership to fill 'tribal balancing' posts. Although the bulk of the members of the Party genuinely support the Party, there is a quite a large portion of the members who are members simply because their employment requires them to be members of the Party.

1. Zambia: Constitution of Zambia Act, 1973, Art. 25(3)

2. See Baylies, C., and Szftel, M., The dynamic of one-party state in Zambia; Manchester UP, 1984, on what sort of man and woman joins UNIP, pp. 58-74.

(b) Party Organization Below the District.

It is pertinent to point out that African political organization in Zambia - in fact in most African states - originated at the national and not the grassroots level, e.g. the native welfare associations in NR during the colonial era.¹ Grassroots organization was 'encouraged', to some extent, by the colonial policy which viewed nationalist movement as potentially subversive and required that every 'society' should be registered with the Registrar of Societies.² The 'society' included the mother body and every and single of its branches formed at the grassroots level. Caution should, therefore, be exercised in concluding that an African political organization is weak simply because it might not be well organized at the grassroots level because the strength of most of the African political parties depends mainly on the strength of the national leadership.

UNIP has existed under different circumstances: it existed as a party outside the pale of power, or as a party struggling for national consensus, or struggling to operate along ideological lines, or as a party dominated by a strong charismatic leader. The answer to the question 'what keeps the organization of a political party going?' is, in the case of a ruling party, usually obvious: in case of UNIP, the Party controls the Government and it has resources of patronage and persuasion of any other party in power. Although the expectation for financial rewards and high office have prompted a number of people to engage in the leadership of the Party and some have acquired fame, financial rewards and high office, the majority of Party organizers below the District level, work in Party organs which can offer neither high office nor financial rewards. The party ideology, to some extent, has helped the Party to keep going: the people at the grassroots level believe in Humanism's principle of no

1. Supra, pp. 58 - 65.

2. NR: Societies Ordinance, 1957, No. 65, secs. 2(1) and 6(1); the latter required that a 'society' of seven and more persons should register with the Registrar of Societies: supra, pp. 70 - 71.

exploitation of man by man. The persistence of the Party at the grassroots level, however, cannot be explained on the basis of the ideology, which is not accurately understood by the majority of the people any way, but in terms of loyalty to UNIP and some of its national leaders particularly those who were engaged in the Independence struggle. UNIP has continued because there are still many Zambians who have confidence in the Party and sincerely believe that the Party is the appropriate machinery for economic and social development of Zambia. The proscription of all other political organization has, obviously, contributed towards the continued existence of UNIP since the law expressly (and literally) provides that there shall be one party and that Party is UNIP.¹ It is within this protection that the Party, although guided by its Constitution, organizes its organs below the District.

The Constitution of UNIP establishes Sections, Branches and Wards as 'local organs'² below the District, each composed of two bodies, the Council, consisting of all the members of the Party at that level, and, the Committee, consisting of office-bearers, namely the Chairman and his Vice, the Secretary, and his Vice, the Publicity Secretary and his Vice and the Treasurer. The Ward Committee contains one and the District Committee two Trustee and Trustees, respectively.³ The trustee is the custos morum of the Party charged with the responsibility of detecting any conduct contra bonos mores the quality or creed of the Party leadership and membership. A lot of importance is attached to the role of the trustee; hence any person elected or nominated a trustee at the grassroots level, requires the prior approval of the Committee of Chairmen before he assumes his duties.⁴ It is often the older members of the Party that are appointed trustees. The office of trustee - and its importance - is a legacy carried from the days of multi-party

1. Zambia: Constitution of Zambia Act, 1973, Art. 4(1).

2. UNIP: Constitution, 1988, Art. 25

3. ibid. Arts. 38(1)(e) and 43(d), respectively

4. ibid. Arts. 41(e) and 42(1)(e). The Ward Committee Trustee is approved by the Provincial Committee: Art. 38(1)(e).

system when one of the functions of the trustee was to 'spy' on party 'rebels' and to act as the confidant of the Central Committee. Under the One-Party system members cannot afford being disloyal to the Party or the Party leadership. The role of the trustee is now that of a 'consultant' on the Party ideology and policies etc., and to act as a peace-maker between or among squabbling Party members, particularly at the Branch level where the style of Party organization is highly authoritarian.

In the rural areas, the Registration and Development of Villages Act, 1971¹ places responsibility for the management of villages in the Ward Councils, working through the Ward Development Committee and the Village Productivity Committee. It also confers on Chiefs powers regarding their respective villages in addition to those conferred on them by the Chiefs Act.² Every village containing twenty or more households, or in the case of smaller settlements a combination of villages (not exceeding five), must establish a Village Productivity Committee (V.P.C.)³ headed by a Chairman who is the Village Headman⁴, that is in the case of a village, or, an elected Chairman, that is in case of a combination of villages.⁵ In the latter case, the chairman is elected by the members of the V.P.C. The members of the V.P.C. are elected by a majority vote of residents present at a meeting called by the local Chief. The V.P.C. has a wide range of functions and duties including planning the growth and development of the village and the promotion of the well-being of the villagers, and in particular to build, improve and maintain school buildings, health centres and roads and provide and improve water supplies in the village.

The duty of the Chief is to preserve the public peace in the area

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1. Zambia: 1971, No. 30, Cap. 483.
 2. 1965, No. 67, Cap. 479, supra, p. 354
 3. 1971, No. 30, Cap. 483, loc. cit., sec. 6(1).
 4. ibid. sec. 6(2)(a)(i).
 5. ibid. sec. 6(2)(a)(ii).

and to take reasonable measures to quell any riot, affray or similar disorders.¹ Each Chief and Deputy Chief has a kapaso or a number of kapasos to assist him in keeping the peace. While in uniform, a kapaso may call on any available male to assist him in quelling any riot, affray or disorder. He may also arrest any person he suspects to have committed an offence in connection with disorder, and detain him until he is able to hand him over to the police or a court of law. No prosecution can be instituted under such arrest without the written consent of the DPP.² The Chief and the Headman remain the community leaders who play the significant role in the resolution of disputes; however, their roles are now affected by the role of the Party at the grassroots level.

Where the Village Headman is also the chairman of the UNIP Branch and the V.P.C., he becomes the most authoritarian person in the area. Where the Village Headman is not the Chairman of the Party Branch and the V.P.C., e.g. where residents of a combination of villages elect a UNIP chairman as the chairman of the V.P.C., there is often tension between the UNIP Branch chairman and the Headman with the former purporting to deal with all the aspects of the village politics and asserting his authority over all village matters, e.g. settling of disputes. The Chief and the Headman, however, retain the adjudicatory functions of the village and not the Party chairman. Any appeal against a judicial decision of the Headman lies to the Chief and from the Chief to the Local Court. The role of the Party chairman at the village level is political mobilization of the people and where he is also the chairman of the V.P.C., in the implementation of local projects. He is accountable to the Ward Chairman³ who is in turn accountable to the DG.

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| 1. Zambia: | Chiefs Act, 1965, No. 69, sec. 11; <u>supra</u> , p. 354. |
| 2. | <u>ibid.</u> sec. 13. |
| 3. | The Registration and Development of Villages Act, 1971, No. 30 establishes Ward Development Committees, chaired by the Ward Chairman, a UNIP official; sec. 11; <u>supra</u> , p. 360. |

(c) The Party and Maintenance of Law and Order at Grass-roots Level.

Zambia has a national police force which was established as part and parcel of the British colonial administration of the region which later became NR and finally Zambia. The North-Eastern Rhodesia Order in Council, 1900, among other things, authorized the formation of a military police,¹ which was established by the Police Proclamation, 1901,² of the High Commissioner. A formal non-military police was established by the Northern Rhodesia Police Proclamation, 1912,³ following the creation of NR. Thus, although the 1980 Act provides that one of the functions of a District Council is

To maintain law and order and ensure national security and good administration of the council,⁴

District Councils do not have their own police force and any offence committed in a district council area, is investigated and prosecuted by the national police under the general law of the land.

Colonial administrators in the 1920's and 1930's appointed 'tribal elders' in urban areas, particularly on the copperbelt, to hear and settle certain disputes among African town-dwellers which the authorities considered not amenable to police or courts' intervention.⁵ Following the emergence of African political organizations, political leaders assumed and played the role of 'tribal elders' and heard and settled disputes among residents in their Branches. UNIP has no police force of its own, but since

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| 1. UK: | 1900, Art. 20, <u>supra</u> , p. 43. |
| 2. NER: | 1901, No. 19, sec. 10. |
| 3. NR: | 1912, No. 17, sec. 3; <u>Northern Rhodesia Gazette</u> , Vol. 2, 18th December, 1912, No. 13, p. 106. The police force was composed as follows:
Europeans: 16 (1909), 18 (1910), 24 (1911)
Africans :392 (1909), 370 (1910), 366 (1911):
<u>Memorandum by Administrator on the First Six Months of NR (1911); BS/3/134 ; NAZ-L.</u> |
| 4. Zambia: | Local Administration Act, 1980, sec. 43 and Reg. 15. |
| 5. NR: | <u>Report of Commission appointed to enquire into the Disturbances in the Copperbelt, Northern Rhodesia; Cmnd. 1935/5009. (Chairman: Sir William Alison Russell); supra, p. 61.</u> |

the introduction of the One-Party system, it has purported to consolidate the system whereby people take their disputes to be heard and settled by Party officials. At the same time Party 'special constables' were deployed to perform policing functions. It is common practice that people - members and non-members of the Party - take their complaints to UNIP offices for attention:

A man was brought before a 'UNIP court' for beating his wife. 'My youths used to patrol the area under my instructions to keep order in the township. If my court', explained Mr Tembo, the chairman of the area, 'found you guilty, we usually took you to the police station for further action. You will be within the law in New Kanyama if you channel your grievances through UNIP office. It may seem wrong to let a political party run a township but residents at New Kanyama are happy about it. Those landlords who charge more than K8 a room can be brought before the 'Court' if discovered'.¹

Historically, UNIP leaders took it upon themselves the role of peace-makers and in controlling and initiating development particularly at the grass-roots level in the squatter-settled areas. Subsequently, "no building was erected without permission from the local Branch Chairman. The leaders tried to control rents, arbitrate in civil disputes and intervened in criminal cases (which was implicitly recognised by the state appointing UNIP leaders as special constables.) Thus the leaders were playing the role of the town clerk, magistrate and city engineer combined; possibly the simile of the chief is more apt."² These activities of the Party leadership are now formally provided for under the Constitution of the Party leaving the question of the legal status of such provisions and role of such Party functions, for instance, vis-a-vis, judicial review, unsettled. It is important to bear in mind one fact that in evaluating the

1. Scott, I., "Party Functions and Capabilities: The Local-Level UNIP Organization During the First Zambian Republic, 1964-1973", African Social Research, 1975, No. 22, p. 115; University of Zambia Institute of African Research, 1975. Brackets supplied.

2. Pasteur, D., The Management of Squatter Upgrading: A Case Study to Organization, Procedure and Participation; Saxon House, 1969, p. 11. Brackets supplied.

role of UNIP at the grassroots level and in particular with regard to patrolling of residential areas by the Party's 'special constables' and the settling of disputes by the Party officials, one should not perceive such activities in the context of any European country where people have access to police protection at short notice. These UNIP activities are carried out in residential areas without public telephone communication, no street lighting and the nearest police station might be twenty or more kilometres away. On the other hand, some Zambians prefer referring their disputes to 'elders' for 'judgement' or 'reprimand' or 'reconciliation'. The police are associated with handcuffs, cells, brutality, fines or imprisonment. That perception of the 'police force' contributes a great deal towards the masses' reference of some of their disputes to Party officials who are local men and women, available day and night, and, in their intervention do not lock-up people but merely reprimand them and ask for reconciliation in 'an African way'.

There are some apparent dangers in this system of maintenance of law and order, for instance, some Party officials' intervention impede normal investigations by the police by prematurely settling complaints. Although the Party Constitution provides, e.g. that the Section Committee shall maintain law and order and monitor the movements, presence or activities of criminals in the section,¹ the procedures to be followed in carrying out such functions are nowhere spelt out or laid down. There is therefore, room for abuse of office, bribery, corruption and denial of natural justice. In addition to that the system does not provide for appeals. This is a serious defect because it is not in all cases that the parties agree that the case should be heard by Party officials; it is essential under such circumstances that a person who has been 'dragged' to appear before the Party officials have the right to appeal against any

1. UNIP:

Constitution, 1988, Art. 29 and Reg. 29(1)(e).

decision he felt was unfair to him.

Usually the maintenance of law and order is carried out by the Party's 'special constables' who patrol residential areas apprehending trouble-makers who are brought before the Section or Branch Chairman. Although the Party Constitution assigns the function of maintaining law and order to the Section or Branch Committee, in practice complaints or reports are made to the Section or Branch Chairman who attends to them alone. The decision is that of the Chairman alone. The deployment of the special constables is not without legal difficulties as the case of Bweupe v. Attorney-General, Zambia Publishing Co., and Times Newspapers Ltd.,¹ showed. The plaintiff in that case was a High Court judge who, in the course of delivering a judgement, said that 'UNIP special constables did not exist in law'. Reacting to that observation, the then Minister of Home Affairs, under whose ministerial responsibility special constables fell, made certain statements which were published by the second and third defendants which the plaintiff considered defamatory of him. The Minister had, inter alia, said that the judge was misinformed or had not read his law volumes properly and that in fact special constables had existed during the colonial days under the Police Ordinance² which provided that

Every special constable under this Ordinance shall have the same powers, privileges and protection and shall be liable to perform the same duties and shall be amenable to the same penalty and to be subordinate to the same authority as police officers.³

It was this colonial device that the Party utilized in the maintenance of law and order. The Minister stated that the President (of Zambia) had directed that special constables be deployed under UNIP and be responsible for the eradication of crime and wondered whether the Head of State could have given instructions that something

1. (1984) ZR 21

2. NR:

1926, No. 16, Cap. 4 (now Cap. 44).

3.

ibid. sec. 10.

should be done that was illegal. He accordingly asked the judge to apologize. The Court ordered nominal damages to be paid to the plaintiff on the ground that to demand an apology from a judge or judicial officer went beyond the defence of fair comment and that it was improper that a member of the public should take it upon himself to call upon a judge to apologize, no matter how wrong that judge or judicial officer might be.

What was in issue in this case was public concern at the manner Party special constables were deployed. Initially the constables worked under the supervision of the police, but gradually they began to operate under the Party chairmen and the DGs. Their role shifted from patrolling residential areas to policing urban areas. There was therefore, a divergence between the law which required that special constables worked under the police officer-in-charge of the area and the practice which allowed the constables to work under the Party. Since the Party could not impose any penalties, in some cases special constables issued reprimands or confiscated property, for instance, in cases of property belonging to persons engaged in illegal trading; contrary to the provision that in Zambia no property of any description should be compulsorily taken possession of except as provided by law.¹

Even the new law which has been passed in an attempt to remove the 'special constables' from the Party, will in fact not be differently enforced. It is now provided that in every Section, Branch and Ward there should be established a vigilante group of such number of persons as may be necessary² to maintain law and order; protect persons and property,³ with power to arrest any person who, in the presence of a vigilante, commits a cognizable offence, or whom he reasonably suspects of having committed a felony.⁴

1. Zambia: Constitution of Zambia Act, 1973, Art. 18

2. Zambia Police (Amendment) Act, 1985, No. 23, sec. 48(1)

3. ibid. sec. 48(5)

4. ibid. sec. 51(1)

According to the new legislation the vigilantes are appointed by the Inspector-General,¹ who incidentally appointed the UNIP special constables, in consultation with the Ward Security Committee, which is composed of Party and Government security personnel. The Inspector-General may delegate his powers of appointment to the officer-in-charge of the police under whose jurisdiction the Section, Branch or Ward falls. The Act does not define the Sections, Branches or Wards; it is however, understood that these refer to Sections, Branches and Wards as provided for in the Constitution of UNIP.² A person is not qualified to be appointed as a vigilante unless he

- (a) volunteers for service as a vigilante;
- (b) is resident in that Section, Branch or Ward;
- (c) is at least eighteen years old;
- (d) is of good moral conduct;
- (e) is physically fit; and
- (f) has no previous conviction.³

It is anticipated that a vigilante will not operate in isolation but in a cell under a Section, Branch and Ward leader who is responsible for discipline and internal administration under his leadership. These legal provisions do not solve the real problems existing in the administration of urban areas in Zambia. The first problem arises from the notion that the Constitution of UNIP is not 'a law', and, as such its officials cannot maintain law and order. Accordingly, the vigilantes are in reality the same persons who operated as UNIP 'special constables'. In practice the vigilantes will operate not under the police officer-in-charge but the Party chairman at Section, Branch and Ward levels, and only in those cases where the matter is too serious to be handled by the Party officials, will formal police intervention be sought. The other problem

1. Zambia; Zambia Police (Amendment) Act, 1985, sec. 49
 2. UNIP: Constitution, 1988, Arts. 27, 31 and 35, respectively.
 3. Zambia: Zambia Police (Amendment) Act, 1985, sec. 49

is that Zambia is said to be one of the most urbanized countries in Africa with nearly 43 per cent of its population living in urban areas.¹ This urbanization has resulted in the mushrooming of 'shanty' or 'squatter compounds'² in urban areas at an alarming rate since Independence. The colonial system which empowered Chiefs and Headmen to control the movement of their people, has broken down and there is to-day free movement of persons particularly from the rural to the urban areas. This has caused shortage of employment, housing and social amenities and an increase in crime. The deployment of UNIP special constables and the vigilantes is one of the means being employed to contain an otherwise explosive social and political situation.

The Party and its Government, however, have failed to contain the situation. This has led President Kaunda to announce that some of the provisions of the Constitution guaranteeing freedom of movement and settlement anywhere in Zambia,³ might be amended or legislation passed to provide for compulsory repatriation of unemployed persons to rural areas of their chiefly origin.⁴ Such a policy would probably meet with little success mainly because most of the unemployed young men and women - the 'born-free' post-Independence generation - have no real roots in or connection with, any tribal area. Their roots are in the urban areas. The only workable policy would be that of the Party coming out with appropriate economic and social plans and programmes, effectively implement such programmes, and, encourage Party members and all people of Zambia to work hard to advance their own political, social and economic welfare and thereby eliminate the social evils that necessitated the deployment of special constables or vigilantes in the first place.

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1. Zambia: Zambia: Country Profile, 1984; Central Statistical Office, Lusaka, 1984; Zambia being being third most urbanized after South Africa and Algeria, p. 48.
 2. Housing (Statutory and Improvement) Act, 1974, No. 30, Cap. 441, refers to them as 'development areas'.
 3. In particular Art. 24(1) which guarantees and protects freedom of movement and residence.
 4. Times of Zambia; 13th July, 1987.

(d) Review of Party Activities at the Grassroots Level.

Local administration in Zambia is governed mainly by the 1980 Act and District Councils are subject to the usual controls under administrative law such as Parliamentary scrutiny¹ of delegated legislation and through judicial review² based on the doctrine of ultra vires to determine whether a District Council had exercised its statutory powers excessively or unlawfully or unreasonably. These are the ultimate safeguards for the citizen against unlawful action by a District Council. Most people, however, have no knowledge of the legal limits of the powers of District Councils to enable them to determine that a decision of a District Council was ultra vires the 1980 Act. Consequently, there has been no cases reaching the High Court requiring a review of local authorities' decisions. The chairmanship of District Councils by a DG and close identification of District Councils and the Party is bound to deter some people from challenging decisions or actions of District Councils fearing that such a challenge might be construed as a challenge of the Party itself.

There is no clear machinery for the review of Party decisions or actions at the grassroots level except through the Party itself. Organs of the Party are answerable and are required to periodically submit account of their work to their superior body and the decision of the superior body is binding upon the subordinate organs.³ In practice the Section, Branch or Ward Chairman hardly submits reports of cases heard by him or his Committee to the superior organ. The mode and manner of the Party's maintenance of law and order in some cases involve the exercise of some quasi-judicial powers by Party officials. The traditional remedies such as the prerogative orders⁴ which, inter alia, facilitate the review of the proceedings of an inferior court, tribunal or local authority, or, the release of a person wrongfully detained, have not been tried against a Party organ or official. In some cases a certain amount of physical force

1. Supra, p. 266.

2. Supra, p. 254.

3. UNIP: Constitution, 1988, Art. 24(1)(b) to (c).

4. Supra, p. 241.

is exerted in compelling persons to appear before the Section or Branch Committee, where convened, or the Chairman. The proceedings before the Committee or the Chairman are highly authoritarian and sometimes rules of natural justice - including the requirement of audi alteram partem (that a person should not be condemned unheard) - are often not observed. At the Section, Branch or Ward level where 'everybody knows everybody' it is easy for the Party officials to pre-judge any issue basing their decision on their knowledge of the parties involved. As with the case at the district level, most people at the Section, Branch and Ward levels do not know their rights, for instance, whether they can refuse to appear before the Party Section Chairman or challenge his decision within the framework of the Party, e.g. by asking for the intervention of the DG. Some Section or Branch Chairmen or Committees can make very serious decisions, e.g. ordering that a person cease to reside within the Section or Branch. Being contrary to the provisions of the Constitution of Zambia,¹ such a decision should be open to an application for an injunction, mandamus or prohibition. But because most people do not know of such protection, they comply with decisions of Party officials whether they are in agreement with them or not. There is no laid-down procedure for such 'eviction'.

The maintenance of law and order by the Party at the grassroots level provides the Party with a machinery to impose its authority. Some form of checks and balances are essential to protect individual rights. The difficult is that the Government is not strong enough to command obedience and to administer the country effectively without the assistance of the Party. Ironically, at the grassroots level it is the Government that assists the Party in the maintenance of law and order.

1. Zambia: Constitution of Zambia Act, 1973, Art. 24(1) protects freedom of movement and the right to reside in any part of Zambia and immunity from expulsion from Zambia.

CONCLUSION.

This Chapter has traced the evolution of local government system in Zambia and showed that after Independence in 1964 UNIP did not effect any revolutionary changes in the system left behind by the colonial administrators. Major changes in the local administration system was introduced in 1980. Pressures for decentralization stem from a variety of causes including, e.g., nationalist demands, geography, ethnic diversity and political considerations. Zambia is a unitary State and the question of provincial governments in the form of provincial assemblies, does not arise. Since Independence provincial administration has been retained mainly for historical reasons but also because some provincial traditional rulers, elites and the like, feel that their welfare and that of their province could not be secured if the present provinces were abolished. Otherwise Zambia could be better administered without the Provinces and provincial administration. The present hierarchical institutionalization of UNIP from the Party Congress to the Section, directly consolidates provincialism. The integration of the Party and local authorities at the provincial and district levels, however, should not be viewed wholly from the perception of African political parties as agents of national integration and development¹ but from the angle of a political party that is anxious to evolve a system of administration at the local level through which conflict, intrusion of divisive tendencies and ethnical cleavages are abandoned in favour of national unity through the One-Party.

Notwithstanding its commitment to Humanism through Socialism, UNIP is not organized on revolutionary socialist centralism, hence it has not successfully effected social transformation of the Zambian society. UNIP's role at the provincial and district levels has, on the contrary, been

1. See for example, Coleman, J.S. and Rosberg, C.G., Political Parties and National Integration in Tropical Africa; Berkeley UP, 1966, p. 127 and Emerson, R., "Party and National Integration in Africa", in LaPalombara, J., and Weiner, M., (Eds.) Political Parties and Political Development; Princeton, 1966, pp. 267-301.

more on practical problems than ideological rhetoric encountered at the national level. Socialism is synonymous with democracy but socialism calls for State-intervention; the State must leave no stone-unturned in its drive to bring social, economic and political change in society. Socialism could be totalitarian, consequently if law and order is not to break down to a point that anarchy sets in in Zambia, more stern measures would have to be employed beyond the appointment of a handful of vigilantes. The enactment of the legislation on the vigilantes although it might contribute towards the suppression of crime at the grass-roots level, it was unaccompanied by legislation or any other measure on the elimination or amelioration of the major causes of crime such as unemployment, lack of housing, education and further training particularly among the youths. Notwithstanding the creation of District Councils with their well spelt out functions, the Government remains principally responsible for the social, economic and cultural welfare and development of the people of Zambia. The local authorities, therefore, should not be turned into scapegoats for any failure on the part of the Party and its Government in providing the people with adequate social facilities and national security particularly protection from crime.

The Party actually plays a vital role in the maintenance of law and order at the grass-roots level. However, the view persists that UNIP is nothing but merely a political organization, and as such, no statutory powers should be given to it. Paradoxically, the Constitution of Zambia does provide that the Party Congress shall elect the President of the Party who becomes the sole Presidential Candidate.¹ Prima facie, legal powers could be allocated to the Party so that there is no further

1. Zambia: Constitution of Zambia Act, 1973, Art. 38(3),
supra, p. 144.

confusion about the role of the Party at the grassroots level.

The Constitution of Zambia establishes principles and shapes the system of government. The Zambian local administration system cannot be understood except by reference to the Constitution and the 1980 Act. It is possible for one to decry as formalistic a study of the local administration system in Zambia which lays emphasis on the provisions of the Constitution and the 1980 Act. It could be argued that processes are more important than institutions and that political realities play important role than legal principles; accordingly, much more importance should be placed on the occupants of public office than on the rules that regulate administrative institutions. The role of the Party functionaries at the grassroots level supports that view. However, the provisions of the 1980 Act should not be underrated; they play a major part in shaping and limiting governmental process. The Zambian society is governed by law and through institutions. If one wanted to improve that society, one ought in the last resort amend laws and alter some institutions and through that change the attitudes of men and women who manage those institutions. Only the most optimist would pin his hope of changing man's behaviour through moral exhortation and criticism unsupported by formal action.

In order to protect and safeguard the welfare of the ordinary citizens, it is essential that the law accurately portrays what goes on in the Zambian society. At the moment there is a divergence between what happens and what the law provides for, e.g., in the control of the vigilantes, who are in fact controlled by the Party and not by the police officer-in-charge of the area of their deployment as stipulated by the law. Machinery for the control and review of UNIP activities at the grassroots level can only be laid down when the law takes cognizance of the Party and its activities.

CHAPTER IX.THE CENTRAL ROLE OF THE PARTY AND THE LABOUR MOVEMENT IN ZAMBIA.Some Legal Obstacles to Cooperation and Subordination.Introduction.

One of the basic natural rights of man, next to that of acting for himself, is that of combining his efforts with those of his fellowmen and acting in common with them. For this purpose, it is the right of an individual to join his associates so as to fashion their public or private life or for the purposes of the promotion and the protection of their interests, and, for other purposes not prohibited by the law of the land.

In NR the legal recognition of trade unions was made by the Imperial Acts Extension (Amendment) Ordinance, 1937,¹ which extended to NR the British Trade Union and Trade Disputes Acts of 1913,² and 1927.³ This legislation was intended to deal with European trade unions which began to emerge between 1936 and 1937. The point that the legislation was intended to control European trade unions was made by the Chief Secretary who, during the debate in the Legco on the draft Ordinance, said that the application of the Ordinance to African labour movement had not been considered.⁴ The first signs of African labour movement appeared in 1935 when Africans employed in the copper mining industries staged their first major strikes for improved working conditions, wages and housing.⁵ This was during the period of the native welfare societies but before the emergence of African political parties.⁶

1. NR: 1937, No. 12; supra, p. 90.

2. UK: 1913, 2 & 3 Geo. 5, c. 30.

3. 1927, 17 & 18 Geo. 5, c. 22

4. NR: Legco Debates, 21st September, 1942; pp. 327-328.

5. UK: On the strikes see: Report of the Commission appointed to enquire into the Disturbances in the Copperbelt, Northern Rhodesia, 1935; Cmnd. 1935/5009.

(Chairman: Sir William Alison Russell).

6. Supra, p. 58.

Although the copperbelt disturbances of 1935 had caused some alarm to the colonial administrators, they were essentially pre-trade union reaction to grievances about taxation, low wages and poor housing. But they had showed a unity of purpose among African workers. In 1943 a committee composed of African Shop Assistants and Tailors was set up on the copperbelt which in 1947, with the assistance of Mr W.M. Comrie, a trade union advisor from the CO, converted itself into the African Shop Assistants and Tailors Union of NR thereby signaling the emergence of African trade unionism in NR. The Trade Union and Trade Disputes Ordinance, 1949,¹ was in general terms and defined a trade union as "any combination, whether temporary or permanent, under the constitution of which the principal objects are the regulation of the relationship between employer and employee, or between employees and employees, or between employer and employer"² and registered with the Registrar of Trade Unions.³

A number of Africans were sent to the UK to train in trade union organization. Africans were thus encouraged to form trade unions mainly because a well organized and efficient African labour movement guaranteed peaceful labour relations in industry, particularly the copper industry. On the other hand, political organization of Africans did not receive the same encouragement probably because a well organized African political movement was likely to be a source not of political peace but political agitation and unrest. The colonial administrators' tough task, however, was how to stop the convergence between African political organization and labour movement, for fear of the 'politicization' of the labour movement which was considered

1. NR: 1949, No. 23, Cap. 507.

2. ibid. sec. 6.

3. Nyasaland Trade Union Congress v. Nkolokesa (1963) R & N LR 184, Cram, J., held that the NTUC which had not registered under the Trade Union Ordinance, Cap. 87, sec. 3 (of Nyasaland, now Malawi) was no more than an unincorporated association, that is not a trade union.

harmful to the trade union movement. Notwithstanding the colonial policy of keeping trade unions separated from the political movement, some working relationship did develop between the two movements.

(i) The NRANC and the Labour Movement.

The view that the extent of the politicization of the African trade union movement in NR was limited to the rank and file of the trade unionists who joined the NRANC and that little labour pressure could be identified with African nationalism,¹ is not accurate in that the NRANC and the NRAMU set up the Anti-Federation Action Council composed of political and trade union leaders to fight against the Federation of Rhodesia and Nyasaland and to coordinate political as well as industrial action. Between 1958 and 1960, Lawrence Chola Katilungu, the president of the NRAMU was vice-president of the NRANC, and acted as president in 1960 when the NRANC president, H.M. Nkumbula was serving a six months prison sentence for causing death by dangerous driving. Katilungu was acting president of the NRANC when he was killed in a car accident in 1960.² There was, therefore, a close link between the NRANC and the NRAMU.

(ii) The ZANC and the Labour Movement.

In 1958 when a split occurred in NRANC and ZANC was formed,³ Katilungu sided with the former against the latter whose existence was short-lived. Although ZANC did not live long enough to establish any relationship with the trade union movement, Katilungu's remaining with the ZANC provided a turning point in the relationship between the labour movement and political parties whose effects are still being felt to-day. The emergence of ZANC meant that some trade union leaders besides Katilungu, who had dominant role in NR African labour movement, preferred to joining ZANC or seeing the labour movement side with ZANC.

1. Henderson, I., "Wage-Earners and Political Protest in Colonial Africa; the Case of the Copperbelt"; AA, Vol. 72, No. 288, July, 1973, 296.

2. Mulford, D.C., The Northern Rhodesia General Election, 1962; Oxford, 1964, p. 35.

3. Supra, p. 72.

For instance, at the All-African People's Conference in Accra, Ghana, in 1958, J.M. Nkomo, President of SRANC signed the Charter of Unity on behalf of the SR delegation and Dr Hastings Kamuzu Banda, President of the NANC signed on behalf of the Nyasaland delegation. But when it came for the NR delegation to sign the Charter, Kenneth David Kaunda signed for ZANC, Harry Mwaanga Nkumbula signed for NRANC and Gordon C. Chindele, signed for the NRTUC.¹ That incident could have meant either that the NRTUC wanted to be seen publicly identified with the political organizations in the independence struggle, or, that it claimed an independent role from that of the NR political parties. The latter and not the former, was probably the case. ZANC and the NRTUC, however, worked well together in that there was no conflict in their policies on racial discrimination, abolition of the Federation, One-man-one-vote and 'African advancement', a phrase which included anything from acquisition of the vote to promotion under-ground in the copper mining industry. The passage of the Race Relations (Advisory and Conciliation) Ordinance, 1957,² which provided a machinery through which Africans could get redress against discriminatory practices in public places, was as a result of combined ZANC and labour movement opposition to racial discrimination, particularly on the Copperbelt.

Although the law and practices favoured trade unions and purported to place a wedge between trade unions and political parties by treating the former as useful and legitimate combines of men recognized by law, and, the latter as societies or as unincorporated members' associations, the prevailing political and social circumstances under which Africans lived, made a linkage between African trade unions and African political parties unavoidable. The labour and political movements were part and parcel of a general African national mobilization against colonial rule.

1. Krishnamurthy, B.S., Cha Cha Cha, Zambia's Struggle for Independence;

Oxford UP, Lusaka, 1972, File 2 Doc. 15.

2. NR; 1957, No. 49, later repealed by the Race Relations Ordinance, 1960, No. 32, established the Central Committee and District Committees on race relations to advise the Governor on how to improve race relations in the country: secs. 8 and 9.

(iii) UNIP and the Labour Movement.

When UNIP appeared in 1959, Katilungu was the leader of both the NRANC and the NRAMU and he was serving on the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland (the Monckton Commission).¹ His membership of the Commission caused a split in the NRTUC of which he was the President. The split resulted in the formation of the RTUC which identified itself with UNIP. By 1963 when it became clear that the country was moving towards independence, a new mineworkers' union was launched aimed at combining the European and the African mineworkers' unions into one union, the UMU. UNIP supported the UMU. The RTUC and the UMU failed to replace the NRAMU (which on the eve of independence was renamed the ZMU) and the NRTUC (which was renamed the ZCTU) respectively. Thus, UNIP backed both losers: the UMU and the NRTUC disappeared while the ZMU and the ZCTU are still in existence to-day. There was a consensus between UNIP and the NRANC and the labour movement on such matters as the termination of the Federation and colonial rule, the broadening of the franchise and independence for NR. But there was no consensus on the nature of the relationship between the political parties and the trade unions. At independence UNIP "qua party sought to bring about unity within the trade union movement, while the party qua government started the process of legislation against the freedom of the trade union movement as a whole".² UNIP showed quite early after independence a desire to control the labour movement, e.g. the Trade Union and Trade Disputes (Amendment) Act, 1965,³ provided that ZCTU office bearers should be appointed by the Minister (of Labour and Social Services).⁴ That was aimed at giving UNIP some influence in

1. Supra, p. 82.

2. Harries-Jones, P., Freedom and Labour, Mobilization and Political Control on the Zambian Copperbelt; Blackwell, 1975, p. 166.

3. Zambia: 1965, No. 3.

4. ibid. sec. 21.

the selection of the leadership of the ZCTU. The legislation, however, was not aimed at curtailing the freedom of the trade union movement in Zambia as a whole, as claimed. The Industrial Relations Act, 1971,¹ which repealed the Trade Union and Trade Disputes Ordinance (Amendment) Act, 1965, no longer requires that ZCTU office-bearers should be appointed by the Minister; instead these are elected for a five-year term by the ZCTU general conference attended by delegates from all the affiliated trade unions.

Commenting on the post-independence relationship between political parties and trade unions in Africa, it has been said that in Tanzania Julius Nyerere's Government took advantage of the presence of British troops putting down an army mutiny to take over the Tanganyika Federation of Labour (TFL) "an objective long desired by Michael Kamaliza, president of the TFL from 1960 and the Minister of Labour from 1963".² In Ghana, after 'the take-over' of the Ghana TUC by the CPP, Kwame Nkrumah asserted that "nobody has a right to call himself a true labour fighter if he is not an honest loyal member of the Convention People's Party because fundamentally the Convention People's Party is the political expression of the Ghana Trade Union Movement".³ Thus, the trend after independence was that more and more African political parties were assuming a firm control of the trade union movement by turning the national labour movement (the TUC) into an integral part of the party in power. Ghana and Tanzania have been popular 'fishing grounds' for political ideas for the UNIP leadership; the ZCTU was accordingly bound to be turned into an integral wing of UNIP. The NCEOPPDZ, however, reported that most of the petitioners who spoke on the role of the labour movement under Zambia's One-Party system, preferred that trade unions operated independent of and free from interference from the Party and the Government. The Commission recommended that ZCTU should be

1. Zambia: 1971, No. 36, Cap. 508.

2. Henderson, I., op. cit.,

3. ibid. p. 290, quoting Meynand, J., and Salah-Bey, A., Trade Unionism in Africa; London, 1967, p. 96.

answerable to the Government and the Party on behalf of individual trade unions for the implementation of policies pertaining to labour matters in the country.¹ The Government (UNIP) accepted that recommendation.² This Chapter is concerned with the relationship between UNIP and the ZCTU in particular and the labour movement in general in the context of the accepted recommendation of the National Commission.

Section 1. UNIP's Line on the Economy.

There have been two major aspects to the relationship between UNIP and the labour movement in Zambia; first, the Party has purported to impress upon the labour movement its central position arising from its possession of political power, and, secondly, the Party's wish to see that the labour movement toes the Party's line on its economic policies and programmes. The labour movement played an important role during the struggle for independence: fighting for the economic well-being of the workers as well as the political emancipation of the country and the achievement of a workers' and peasants' alliance. The independence struggle became possible by the combination of economic and political aspirations of the African people as a whole; hence, workers and non-workers drew important revolutionary experiences and conclusions from the events which in the end led to Independence on 24th October, 1964.³ Before Independence UNIP had declared that a UNIP Government would encourage the formation and management of strong trade unions and employers' associations in all major industries.⁴ But there were some contradictions in the economic policies and developmental structures inherited at independence, e.g. economic laissez faire carried out by private companies, which the Party tried to solve through economic planning and reforms, for example, the first economic reforms announced on the 19th April, 1968, and the second economic

1. Zambia: NCEOPPDZ; Report, 1972; p. 61, par. 183.

2. NCEOPPDZ-SRAG, 1972; p. 30.

3. Supra, p. 82.

4. UNIP: When UNIP become Government, 1960; p. 13.

reforms of 11th August, 1969 which introduced State capitalism in the Zambian economy. These economic reforms, however, were influenced by principles enunciated in Humanism in Zambia and a Guide to its Implementation Part I, adopted by the National Council of the Party at its meeting held on 26th April, 1967. The ideology was aimed at giving the people a revolutionary consciousness in the post-colonial rule era. The establishment of a one-party participatory democracy in 1972 gave the Party a dominant role while relegating the labour movement further into the political background. The political line of the Party vis-a-vis the economic policy of the land, was said to be Humanism through Socialism: "Capitalism is not our political line. Therefore, those who promote the line of capitalism are acting outside the line of the Party."¹

The Zambian economy is based on mixed State and Private ownership of means of production and distribution UNIP itself is not a socialist party guided by ideas of Marxism-Leninism; it is a mass party guided by an ideology that is quasi-political and also quasi-religious, humanism. Although the labour movement is not opposed to the socio-economic transformation introduced by the Party through the economic reforms that have resulted in State ownership or State participation in major industries, the labour movement is resisting the creation of a socialist democratic party of the working class and peasants preferring instead maintaining a clear separation of the Party and the labour movement.

During the period 1975-85 a number of Zambians have been trained in the Eastern European socialist countries. Most of these have returned home. The Zambian political party situation is, however, not considered 'ripe' yet for organization of an independent vanguard

1. Zambia:

The 'Watershed' Speech, by His Excellency the President, Dr K.D. Kaunda, 30th June-3rd July, 1975, p. 6: Government Printer, Lusaka, 1976. Underlining supplied.

proletarian party, but these 'advanced workers' participate in UNIP's activities in the hope of influencing progressive socio-economic changes. That has led to criticism of Humanism as an ideology to be achieved through Socialism on one hand, and, of the role of the labour movement, on the other. The labour movement is accused of failing to spread ideas of socialism among the workers and of not supporting the Party in the implementation of its socio-economic policies and programmes. The labour movement is perceived not only as an instrument of the mobilization of workers, but also as an instrument through which to spread and instil the Party's ideology in general and its economic policies ('the Party line'), in particular.

Although the Constitution of the Party provides that the main task of the Party and the working people of Zambia is to accomplish a victorious transition from capitalism to Socialism,¹ the Constitution of Zambia is silent on that matter² instead it contains a Bill of Rights which guarantees and protects fundamental human rights and among these is the right to property: no property of any description can be compulsorily taken possession of, and no interest in or right over property of any description can be compulsorily acquired, except under the authority of an Act of Parliament which provides for payment of compensation for the property or interest or right taken possession of or acquired.³ The Constitution does not, however, guarantee social or economic development. The 'Party line' on the economy is not backed by any law but ideology, consequently, its success (or failure) depends, to some extent, on the support Party policies receive from, inter alia, the labour movement. In order to secure that support, UNIP appears to pursue methods, first, to allow trade unions to operate as constituted and empowered by legislation, in particular the Industrial Relations Act, 1971⁴; secondly,

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1. UNIP: Constitution, 1988, Art. 4. Emphasis by the writer.
 2. Zambia: Constitution of Zambia Act, 1973, Preamble states that the One-Party system is established under Humanism.
 3. ibid. Art. 18(1).
 4. 1971, No. 36, Cap. 508, sec. 5.

to influence the selection of leaders of the trade unions in particular the key ones such as the MUZ and the ZCTU, and, third, to covert the ZCTU into a wing of the Party. But each of these devices is transitional; finally, it is projected that a 'humanist democracy' will enhance the role of mass organizations such as trade unions, women's and youth leagues and the Party would then assume a new quality and "would be transformed into a vanguard Party of workers - the only class in humanism."¹

Although in Zambia no attempt has been made to assimilate trade union leadership into the Government bureaucracy, attempt has been made to turn the labour movement, through the ZCTU, into a wing of the Party; but without success. The labour movement has resisted being turned into a wing of the Party for fear of Party intervention in the internal affairs of trade unions which could result in the unions being unable to function as independent institutions. The following Table shows the membership of the major trade unions in Zambia.

TABLE G: Trade Unions and Trade Union Membership in Zambia.²

Name	Registered	Membership
1. Airways and Allied Workers'	1968	2,800
2. Builders, Engineering and General Workers'	1960	28,000
3. Civil Servants'	1969	18,683
4. Commercial and Industrial Workers'	1971	25,000
5. Financial Institutions and Allied Workers'	1970	6,273
6. Guards'	1972	15,520
7. Hotel and Catering Workers'	1966	5,000
8. Local Authorities Workers'	1971	25,000
9. Mineworkers'	1949	53,000
10. Plantation and Agricultural Workers'	1962	13,000
11. Postal and Telecommunications Workers'	1964	4,000
12. Public Service Workers'	1960	50,694
13. Railways Workers'	1950	7,495
14. University of Zambia Workers'	1976	1,760
15. Zambia Electricity Workers'	1971	4,002
16. Zambia National Union of Teachers	1962	15,520
17. Zambia Typographical Workers'	1971	2,000

1. UNIP: Programme (1979 - 1989) Transition from Capitalism to Socialism; 1979, p. 32.
2. Ministry of Labour and Social Services, Lusaka, February, 1985.

The Table on the previous page showing the membership of the major trade unions in Zambia, illustrates the strength of the labour movement in Zambia. It is obvious that both the Party and the labour movement are well organized with quite a large membership. Consequently, both claim to be representative, champion and protector of the people's interests and welfare. The reality of freedom of association in non-political organizations under a One-Party system is attenuated by the fact that invariably the One-Party system displays a tendency towards co-opting every organization of any public significance like women's and youth organizations, co-operative societies and trade unions under the umbrella of the ruling party. In Ghana and Tanzania the co-option was mainly of the Trade Union Congress. In Zambia only the ZCTU was affiliated to UNIP;¹ there was no affiliation of individual trade unions. The Party's policy has been the integration of the ZCTU and the Party. The failure of that policy has resulted in a new policy of affiliation of individual trade unions to the Party.

Section 2. The Designation of the ZCTU as a Mass Organ of the Party.

The previous Section noted that the Government accepted the recommendations of the NCEOPPDZ with regard to the role of trade unions under a One-Party system in Zambia. The Constitution of UNIP annexed to the Constitution of Zambia Act, 1973, implemented only one of the NCEOPPDZ recommendations, namely the inclusion of one delegate representing each trade union affiliated to the ZCTU to attend the Party's General Conference.² It was the Party Constitution adopted at the Eighth General Conference in September, 1978, which implemented most of the Commission's recommendations,

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1. UNIP: Constitution, 1973, Art. 5(5) and Reg. 1(1)(d) provided that the ZCTU paid K100 affiliation fee and K70 annual subscription.
 2. ibid. Art. 32(3)(c). Six representatives selected by the ZCTU attended the National Council: Art. 29(1)(f).

by providing as follows, that

- (a) four representatives from the ZCTU and one from each of its affiliated trade unions attend the General Conference,¹ and the National Council;²
- (b) one representative from each of the trade unions operating in the Province, to sit on the Provincial Council;³
- (c) one representative from each of the trade unions operating in the District, to sit on the District Council⁴ and the District Conference⁵

of the Party. This representation of trade unions on Party organs was considered by the Party not to have established an effective link between the Party and the labour movement: the trade unions remained unaffiliated to the Party. In 1978 UNIP tried to designate the ZCTU as a mass organ of the Party and accordingly deleted from the Constitution the provisions on affiliated membership of the ZCTU. UNIP purported to adopt a similar system to that prevailing in Tanzania where the CCM Constitution provide that

80.(1) There shall be designated mass organisations, consisting of members who are united together for mobilization purposes in order to achieve certain objectives. The affairs of these organisations shall be conducted under the guidance and supervision of the Party.

(2) The following organisations are hereby designated as mass organisations:-

- (a) the Youth Organisation,⁶
- (b) the Union of Tanzania Women,⁷
- (c) the Union of Tanzania Workers,⁸
- (d) the Union of Co-operatives,⁹
- (e) the Tanzania Parents' Association.¹⁰

The ZCTU resisted being designated a mass organization of UNIP on the Tanzanian model on a number of grounds which clearly revealed fundamental differences between UNIP and the labour movement. The ZCTU contended

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| 1. UNIP: | Constitution, 1978, Art. 44(4)(a) |
| 2. | <u>ibid.</u> Art. 48(1)(g) |
| 3. | <u>ibid.</u> Art. 42(h) |
| 4. | <u>ibid.</u> Art. 37(g) |
| 5. | <u>ibid.</u> Art. 39 |
| 6. Tanzania, CCM: | Constitution, 1977, Art. 80: |
| | (a) <u>Umoja wa Vijana</u> |
| 7. | (b) <u>Umoja wa Wanawake wa Tanzania</u> |
| 8. | (c) <u>Umoja wa Wafanyakazi wa Tanzania</u> |
| 9. | (d) <u>Muungano wa Vyana vya Ushirika</u> |
| 10. | (e) <u>Umoja wa Wazazi</u> |

among other things, that

- (a) UNIP is already a mass organization and that her traditional and historical wings were the women's and youth leagues,
- (b) labour movements are established under the Industrial Relations Act, 1971, and accordingly exist under that law,
- (c) designation would be a derogation and contrary to the fundamental freedoms which embrace freedom of association to freedom to organize and freedom of expression,
- (d) designation would be contrary to world community's notions of the role of trade unions and contrary to the principle of voluntary membership of the Party based on freedom to associate with full conscience to a political party,
- (e) the link between the Party and other labour movements should be based on the the following principle which should be included in the constitution of the Party:
 - (i) There shall be industrial workers' organizations affiliated to the ZCTU and shall participate in the political and national affairs of the country.
 - (ii) The leaders of mass organizations and the ZCTU shall have UNIP membership cards when attending the National Council and General Conference of the Party.¹

These suggestions of the ZCTU found their way as Art. 59(1) of the constitution of UNIP, 1978, adopted by the 8th General Conference of the Party, 9th September, 1978. The objection to designation of labour organizations is based on the fear that they would be deprived of their independence to run their affairs free of the Party's interference. The right to associate implies the right not to associate:² those associations should be left free to choose whether to or not to affiliate to the Party in the same way an individual is free to join or not to join the Party. But this comparison is misleading; the GTUC, the TFL, the MTUC³ and the ZCTU are not private but public institutions, performing quasi-public functions, financed by the State. The designation of trade unions as mass organizations of political parties is acceptable practice in a

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1. Zambia: ZCTU Circular Letter, Ref. OD/19/1283/78; dated 14th September, 1978.
 2. See: The Cane-Farmers' Incorporation and Cess Act, 1965 as amended in 1973 of Trinidad and Tobago and the case decided on it; Trinidad and Tobago Island-Wide Cane-Farmers Association Inc. and Attorney-General v. Prakash Seereeram (1975) Civil Appeals No. 11 and 14 (unreported): PA, 1977, p. 217; supra, p. 382.
 3. Ghana TUC and Malawi TUC, respectively.

number of countries.¹ What is important in each case in the real intention of the designation: if the intention is to undermine, curb or swallow-up all such associations because the political party sees them as a threat or source of independent power, then the designation should be resisted. Where, however, the purpose is genuinely to bring together national organizations, designation actually helps the designated organization to come to know how the party works. In practice, designation produces alliance between the elite in the political party and the labour movement; prima facie, designation can be freely achieved where there is no conflict between the two. The failure to designate the ZCTU as a mass organ of the Party in 1978 and the manner the Party did not force or impose the designation was due to the delicate background of the relationship between UNIP and the ZCTU which goes back to the days when UNIP opposed the ZCTU in support of the RTCU. The intention of UNIP in the aborted designation of the ZCTU was to implement its projected policy of a politico-economic body corporate, what President Kaunda described as "communalism, a community based on the principles of a prosperous collective socialist life, free from conflict between political party and labour movement".²

(a) The Legal Effect of Designation.

The constitution of UNIP as finally adopted at the 9th General Conference provided as follows, vis-a-vis, designation:

59.(1) The following shall be designated as mass organisations of the Party:

- (a) Women's League;
- (b) Youth League;
- (c) Zambia Co-operative Federation, and
- (d) any other organisation so designated by the Central Committee.

(2) There shall be workers' organisations affiliated to the Zambia Congress of Trade Unions.

(3) All persons representing a mass organisation or Zambia Congress of Trade Unions or any trade union at a meeting, council or conference of the Party shall be members of the Party.

1. Hooker, M.B., Legal Pluralism, An Introduction to Colonial and Neo-Colonial Laws, Clarendon Press, Oxford, 1975, p. 418.

2. UNIP: 9th National Council, 14th-24th September, 1975.

Although the legal effect of the designation of an organization as a mass organ of a political party depends on each arrangement, in general designation subordinates the role of the designated body to that of the designating organization. Where, however, the designated organization is a statutory body such as the Zambia Federation of Co-operatives, established by and operating under the Co-operative Societies Act, 1970¹ the organization continues to operate in accordance with the law of its incorporation. If the ZCTU, which is established under the Industrial Relations Act, 1971² was designated a mass organ of UNIP, its funds and property would not become the funds and property of UNIP. The provisions which required the Minister to appoint the office-bearers of the ZCTU³ were repealed by the Industrial Relations Act, aforementioned. Being statutory bodies, UNIP does not approve the constitution of the Federation of Co-operative Societies or the ZCTU. The designation of the Federation enables the Federation to be represented in all Party organs⁴ including the District Council.⁵ Consequently, by its refusal to be designated a mass organ of UNIP, the ZCTU is not represented in the District Councils, although it is represented at the National Council⁶ and the Party Congress.⁷

The designation of the ZCTU as a mass organization of UNIP would bring indirectly all trade unions under the influence of the Party because the ZCTU represents the labour movement in Zambia;⁸ e.g. the Trustees of ZCTU

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| 1. Zambia: | 1970, No. 63, Cap. 689. |
| 2. | 1971, No. 36, Cap. 508. |
| 3. | <u>Supra</u> , p. 408. |
| 4. UNIP: | Constitution, 1988, Arts. 41(f), 46(g), 51(b)(v), 55(1) |
| 5. | <u>ibid.</u> Art. 41(f). |
| 6. | <u>ibid.</u> Art. 55(1). |
| 7. | <u>ibid.</u> Art. 51(a). |
| 8. | <u>Supra</u> , p. 413; practically all trade unions registered with the Registrar of Trade Unions, Ministry of Labour and Social Services, are affiliated to the Zambia Congress or Trade Unions as required by law: sec. 27, Industrial Relations Act, 1971. |

sought a declaration that a S.I. issued by the Minister of Labour and Social Services under the Industrial Relations Act, 1971, was null and void. The State objected to the application, contending, inter alia, that the applicants and/or the ZCTU had no substantial interest in the proceedings, rather it was the trade union affected by the S.I. which had the right to challenge its validity. The Court ruled that as the ZCTU was concerned with all trade unions, it had a reasonable interest in the S.I. and, therefore, had a locus standi, to bring the action.¹

The One-Party system has not affected the legal rights of workers to associate in a trade union and the refusal of the ZCTU to be designated a mass organ of the Party was not based on the fear that such a close association between the Party and the labour movement would or might result in a gradual or a systematic disappearance of trade unions. On the eve of the 1983 and 1988 Party Congresses further attempts were made to designate the ZCTU as a mass organ of the Party and on both occasions the attempt failed. It is now provided that there shall be workers' organizations affiliated to the Party² and that the Committee of Chairmen may designate any organization as a mass organ of the Party.³ The effect of this provision is to introduce two systems of association with the Party, vis-a-vis organizations, i.e. either through affiliation or designation. Trade unions are consequently excluded from unilateral declaration by the Party as organs of the Party. The Party has been reluctant to unilaterally declare the ZCTU as a mass organ of the Party fearing that might probably lead to industrial strife. The new provision undermines the ZCTU as it enables the Party to secure the affiliation of individual trade unions to the Party and isolate the ZCTU from the Party. That will work to the disadvantage of the ZCTU and not the Party.

1. Sichone, Fulilwa and Mbewe (as Trustees of ZCTU) v. Attorney-General
(1985) ZR HN/227 (unreported)

2. UNIP: Constitution, 1988, Art. 81(2).

3. ibid. Art. 81(1)(d).

(b) The Relationship between the Party and ZCTU.

The rejection by the ZCTU to be designed a mass organ of the Party in 1978 strained the relationship between the two bodies. In 1980 the ZCTU mounted a strong campaign against the introduction of a new system of local government. When the Local Administration Bill, 1980, was before Parliament, the ZCTU called for strikes of workers against the Bill. There were riots and on the Copperbelt one person died and there was damage to property. When the ZCTU refused to call off the strikes, seventeen labour leaders were expelled from the membership of the Party. The opposition to the Bill spread to Parliament where it could not receive the support of the majority of the benchbenchers. By mid-1981, the Party and the Labour movement relationship had deteriorated by more strikes. On Monday, 27th July, 1981, in a dawn radio broadcast in the fashion of the British Governor, Sir Arthur Benson's dawn radio broadcast of Thursday, 13th March, 1959, in which he announced the banning of ZANC and the restriction of its entire top leadership,¹ President Kaunda announced that he had ordered the detention of a number of labour leaders and gave the reasons:

The objectives of the leaders of ZCTU I have decided to detain have not been to secure for the workers better salaries and conditions of service. Far from it. Theirs have been political objectives. In secret meetings that Fredrick Chiluba has held with his co-conspirators, he had stated that his ultimate object and that of his fellow leaders in the ZCTU is to take over the Zambian leadership. They have, therefore, sought to use workers to achieve their political aims.²

The Party's concern over the role of the ZCTU is usually in the context of the ZCTU being the watchdog of trade unions but not as an independent opposition organization. The idea of organising a trade

1. The Northern News; 14th March, 1959: 'Zambia Banned: All Leaders Arrested', p. 1; supra, p. 73.

2. Chiluba v. Attorney-General (1981) ZR HN/713 (unreported) Exhibit 'FJTC 2', p. 41.

union congress did not originate with the government or political parties, but trade unions themselves. The RTUC was formed in NR before both independence and the one-party system. The ZCTU is not, therefore, a device of the one-party system whereby the activities of all trade unions in Zambia should be placed under close control and supervision. Hence, the difficult of establishing a cordial relationship between the ZCTU and the Party. President Kaunda in his dawn statement stated that in addition to political ambitions, there were ideological differences between UNIP and the ZCTU leaders; the former, he said, stood for Humanism through Socialism, while the latter stood for Capitalism, which made him to conclude that "I am sure these must be some of the very few trade union leaders in the developing countries who think that capitalism is good for workers. Yet the history of trade unionism is one of struggle between capitalism and the workers."¹

Under Zambia's one-party system people are free to form and belong to non-political organizations such as trade unions provided that such organizations are not "prejudicial to the national interests".² Although UNIP's political line vis-a-vis the economy, is projected as socialism, that does not make any organization that advocates capitalism 'prejudicial to the interests' of the nation. Since its inception, the powers of the ZCTU have been laid down by statute and these are non-political.³ The problem has been that the ZCTU has not accepted Socialism as the economic policy to be pursued in Zambia, on one hand, and, the dominant role of UNIP, on the other. There is a conflict of ideologies between those in the top leadership of the Party and the ZCTU which appears to lack both an independent arbiter and universally acceptable solution.

1. (1981) ZR HN/713 (unreported) Exhibit ' FJTC 1', op. cit., p. 28 par. 8.

2. Zambia: Constitution of Zambia Act, 1973, Art. 4 and NCEOPPDZ, Report, 1973, p. 8, par. 30.

3. See Tordoff, W. (Ed.) Politics in Zambia; Manchester UP, 1974, pp. 298-300 on the establishment of the ZCTU and the enactment of the Trade Union and Trade Disputes Ordinance (Amendment) Act, 1965, No. 3.

(c) Judicial Intervention.

The impression given of the one-party system is that the central role of the party has the effect of placing all public institutions under the control of the party, for instance, the activities of the national assembly, the courts of law and mass media. This is seen as one of the contributing factors in the failure by the judiciary to safeguard the enjoyment of the fundamental rights and freedoms of the individual where these are provided for in the Constitution. The cases cited as evidence of this failure are concerned with judicial failure to invalidate certain legislative measures and with respect to executive or administrative actions connected with detention and liberty of the citizen. With respect to Zambia, judicial invalidation of a legislative measure¹ and/or executive and administration action, are comparatively frequent.² It could be argued that judicial review of executive power does not involve the role of the Party. However, the President is the President of the Party and the State, prima facie, his actions cannot be divorced from the Party. The Government responsible for administrative actions, is the Government of the Party; consequently the Party cannot be isolated from administrative actions of the Government. Judicial review under such circumstances means judicial intervention in political wrangles between the Party and individuals; or, as in the detention of the ZCTU leaders, into political controversies.

In Chiluba v. Attorney-General,³ the grounds of detention furnished to the applicant stated, inter alia, that he, as the Chairman General of the ZCTU, had told a rally on 1st May, 1981, that the leaders of the labour movement and workers had lost confidence in the Party

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1. Zambia: Mumba v. The People (1984) ZR 38 on invalidation of sec. 53(1) of the Corrupt Practices Act, 1980, No. 14, being contrary to Art. 20(7) of the Constitution of Zambia Act, 1973, No. 27.
 2. See for instance: Kaira v. Attorney-General (1980) ZR, 172 and Chisata and Lombe v. Attorney-General (1981) ZR 35.
 3. (1981) ZR HN/713 (unreported).

(UNIP) and the Government of Zambia, and as a result strikes of workers followed on various Copperbelt towns. In his affidavit in support of his application for a writ of Habeas corpus ad subjiciendum, the applicant stated that the ZCTU and the labour movement in the country were opposed to the introduction of the decentralized local administration system in Zambia because it "had been tried elsewhere - notably Tanzania - with unfortunate consequences to the economy of that country",¹ and that the labour movement did not want to see sums of money being spent experimenting a system which had failed elsewhere. The applicant and the rest of the other detainees were detained under Reg. 33(1) of the Preservation of Public Security Regulations, made under the Preservation of Public Security Act, 1960, which made it an offence for any person to engage in activities which threatened public security.²

Granting leave for the writ to issue, Moodley, J., stated that the court's inquiry was not to make a finding of guilty or innocence, but to establish whether or not there was a reasonable cause to suspect that the applicant was engaged in activities that threatened public security as alleged. He made reference to Art. 22 of the Constitution of Zambia which provides, inter alia, that except with his consent, no person in Zambia should be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold and express opinion without interference and freedom to receive and communicate information. On the

1. Chiluba v. Attorney-General (1981) ZR HN/713, (unreported) Exhibit 'FJTC 1', p. 28, par. 80.

2. Zambia:

1960, No. 5, Cap. 106 now Cap. 109, whose sec. 2 reads: "In this Act, the expression 'public security' includes the security of the safety of persons and property, the maintenance of supplies and services essential to the life of the country, the prevention and suppression of violence, intimidation, disorder and crime, the prevention of suppression of mutiny, rebellion and concerted defiance of and disobedience to the law and lawful authority and the maintenance of the administration of justice."

meaning of the provisions of sec. 2 of the Act, the court stated that the section prohibited acts of violence and overthrow of the Government by unlawful means:

But that did not in any way suggest that citizens were denied freedom to discuss whether the Government could be overthrown by reasons of circumstances prevailing in the country. In these circumstances therefore, grounds one to four did not come within the provisions of the Preservation of Public Security Regulations. A person should not be prevented from aspiring to position of leadership if he wants. Similarly, grounds five to six concerning taking over of the leadership was not a matter of public security as it was not suggested that the taking over of the leadership was to be achieved by unlawful means.¹

In practice, the phrase 'overthrow of the Government by unlawful means' can mean nothing or a lot of things. The colonial administrators who devised the provisions of the Preservation of Public Security Act, 1960, detained African nationalist leaders for organizing boycotts of public and private institutions, strikes and demonstrations on the ground that their actions threatened public security and were intended to overthrow the Government by unlawful means. The nationalist leaders, ofcourse, used such detentions as proof of lack of freedom of assembly and arbitrariness etc., of colonial rule. The inclusion of fundamental rights and protection of freedoms of the individual provisions in some of the Independence Constitutions, was supported by the African leaders and followers as safeguards against arbitrariness on the part of the executive or administration. It is political, economic, social and legal effects of such incidences as those occuring in Zambia that decide the fate of bills of rights. The decision above showed that a well organized trade union movement as that existing in Zambia could bring the economic situation of the country through strikes to a virtually stand still without those responsible for such action being lawfully accused of engaging in actions likely to the collapse of the Government.

1. (1981) ZR HN/713 (unreported), per Moodley, J., at p. 72 pars. 15-20.

In Zimba v. Attorney-General,¹ the applicant was accused of having conspired, in his capacity as the ZCTU General Secretary, with the Chairman General of the ZCTU, aforementioned, and other labour leaders to incite workers to condemn, humiliate and show disrespect to the Minister of Labour and Social Services, and, as a consequence, the Minister's official car was damaged by rioters. The Court noted that although technically speaking, the provisions of sec. 2 of the Preservation of Public Security Act, aforesaid, might affect public security, but they did not fall within that section because isolated incidents which did not endanger public security at large as contemplated by the section and consequently the detention was unjustified.² In the third case, Sampa v. Attorney-General,³ the applicant was Vice-Chairman General of the ZCTU and his grounds of detention stated that he had told May Day rally on 1st May, 1980, that the ultimate aim of the ZCTU leadership was to take over the leadership of the country. Granting leave that the writ of habeas corpus issue, the High Court Commissioner observed that simply expressing an ambition to take over the leadership of the country per se, did not make the author of the statement a public risk: "He might be a threat to the politicians in their political jobs, but that is an area of activity which is totally different from public security matters. Unless it is shown that the fulfilment of political ambition touches on public security and its preservation, people must be allowed to aspire for the highest offices of the land."⁴

The fourth case, also heard by the High Court Commissioner, was Walamba v. Attorney-General,⁵ in which the applicant was the Vice Chairman of the ZMU. He was supplied with four grounds for detention,

1. (1981) ZR HN/715, (unreported).

2. ibid. per Sivanandan, J., at p. 36, par. 10.

3. (1981) ZR HN/716, (unreported).

4. ibid. per Musumali, HCC, at p. 109 pars. 10-20.

5. (1981) ZR HN/714, (unreported).

accusing him, inter alia, of having called mine workers to go on strike telling them that "the strike was the best treatment which President Kaunda's rotten Government could be given, thereby inciting the mine workers to go on illegal strikes."¹ The High Commissioner noted that some of statements alleged to have been made by the applicant were said to have been made in August, 1980 and January, 1981, that was at the time the labour movement was engaged in the fight against the introduction of a decentralized system of local administration which led to seventeen of labour leaders being expelled from UNIP. He accordingly found that the cause of the illegal strikes on the Copperbelt were the introduction of decentralization Bill in 1980 and the subsequent expulsion of the labour leaders and that there was no link between the applicant's speeches and the strikes. The detention was found unreasonable and the release of the applicant ordered.

Although the Attorney-General lodged appeals in all the four cases,² these were later abandoned on the ground that the relationship between UNIP and the ZCTU in particular and other trade unions in general, had meanwhile improved. That was in fact, far from the truth. The fact was that both sides preferred a truce; acknowledging that whatever decisions the Supreme Court were to make, would not bring any change in the relationship between the Party and the labour movement. Only the detention of the labour leaders had converted into a legal problem what was otherwise basically a political dispute between the two organizations: the refusal of the ZCTU to be designated as a mass organization of UNIP. The decisions cited above tend to show that judicial intervention may not provide solution to political differences though presented in a

1. (1981) ZR HN/714 (unreported), Exhibit 'W 4' Ground No. (2).

2. Attorney-General v. F.J.T. Chiluba (1981) SCZ/8/384
Attorney-General v. N.L. Zimba (1981) SCZ/8/383
Attorney-General v. C. Sampa (1981) SCZ/8/385
Attorney-General v. T. Walamba (1981) SCZ/8/385 (consolidated with the previous appeal case).

camouflaged legal context. Commenting on the attitude of the courts in India in cases which touch on political issues, it has been said:

In the Indian constitutional jurisdiction it is rather difficult for the court to keep itself aloof from political questions. When the court considers the reasonableness of any statute, the court has to examine the political philosophy behind it The court in India can play the role of a mediator to establish political and judicial balance.¹

In Zambia Art. 26 of the Constitution provides for the derogation from the observance of the fundamental rights and freedoms of the individual guaranteed by the Bill of Rights; nothing done under the authority of any law should be held to be inconsistent with or in contravention of the provisions of the Bill if it is shown that the law in question authorises the action taken unless it is shown that the measure exceeded anything which, having regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purposes of dealing with the situation in question. The labour law of Zambia, on the other hand, is based on the principle that labour disputes should be handled according to law, that is, in an orderly manner through conciliation, arbitration or adjudication. That law, however, does not contain any machinery for solving political disputes of the nature arising between the Party and the ZCTU. The labour movement operating in and under any one-party system will have to accept the fact that in a single-party state it is around the Party and not trade unions that all political activities take place. The Party asserts that its role is through its central organs which are supreme compared to those of the Government such as Parliament and Cabinet. Under such circumstances, it is futile for the labour movement to claim independence of the Party control, co-operation or subordination. The ZCTU's refusal to be designated as a mass organ of UNIP is seen as insubordination.

1. Jha, C., Judicial Review of Legislative Act; Tripathi, Bombay, 1974, p. 353.

In a multi-party system, trade unions are free to align themselves with any political party or remain independent. That situation makes it much easier for trade unions to 'play politics' of their choice. Under a One-Party system, the situation is different. There, the ruling political party calls the political tune to which all institutions, including trade unions, are expected to stand-up and dance to. There are three main reasons why the ZCTU has been reluctant to stand-up and dance to UNIP's tune; first, the labour movement in Zambia is highly politicized; born not with a copper spoon in its mouth, but a copper rock in its hand which it learnt early in infancy to throw at colonial rule and settler domination. The spirit which developed during the colonial era of fighting political as well as industrial battles, lingers on in the labour movement. The fact that there is now an African Government in office has had little impact on the labour movement's notion of independence from government, employers and political parties. Second, the conflict is historical. UNIP's support for UMU in opposition to AMU and UNIP's support of RTUC in opposition to the ZCTU, is still a source for mistrust between UNIP and the ZCTU. The inclusion of the Chairman of the ZMU (Mr Timothy Walamba) and ZCTU Deputy General Secretary (John Sichone) in the Central Committee at the 10th Party Congress in August, 1988,¹ was the latest attempt by UNIP leadership to patch-up some cracks between the Party and the labour movement.

Third, notwithstanding the provisions of Art. 4 of the State Constitution which establishes the One-Party system, the Party remains devoid of legal capacity. The ZCTU is established by law,² and it can and does intervene in inter-trade union disputes or refer the same to the IRC.³ This lack of a legal basis for the role of the Party in labour matters, weakens its claim for superiority over the labour movement; in particular the ZCTU.

1. Supra, p. 140, et seq.

2. Zambia: Industrial Relations Act, 1971, No. 36, sec. 26(2) replacing sec. 211(1) of the Trade Union and Trade Disputes Ordinance (Amendment) Act, 1965, No. 3, Cap. 25.

3. ibid. sec. 98.

But one obvious point appears to have not yet dawned on the labour movement namely that, although the Party might lack legal capacity as a Party, the Party and the Government are in fact one and the same thing. Accordingly, what the Party cannot do as a Party, it can do as a Government. Consequently the making of the Trade Union (Deduction of Subscriptions) Regulations, 1985,¹ was the Party's retaliation through its government-wing against the ZCTU's stubborn refusal to be designated an organ of the Party. The economic situation in Zambia has been on the decline since the introduction of the one-party system. The labour movement accuses the Party and its Government of a mismanagement of the economy and 'wrong' economic policies. It is of course the function of the Party to explain (to the satisfaction of the labour movement) its economic policies and whether those policies were succeeding or failing. The Party appears unable to explain where the economic problems emanate from or the remedies to be applied to those problems except to blame the poor copper prices, on one hand, and, frequent illegal strikes staged by the labour movement, on the other. On the face of it, the economic decline in Zambia would result in industrial unrest, but as a matter of fact, the people in the labour movement and the Party leadership are the most comfortable in the country compared to the peasants and the unemployed who constitute the majority in the population who have suffered from lack of basic commodities such as salt, sugar, soap, mealie-meal. Where some of these commodities are found, people have to pay exorbitant prices for them. These are not the issues the Party and the ZCTU are apparently fighting about. The conflict is about the strength and persistent refusal of the ZCTU be part and parcel of the Party.

The Trade Union (Deduction of Subscriptions) Regulations, 1985 were intended to weaken the ZCTU and not to prohibit striking

1. Zambia: 1985, No. 6, made under sec. 20, Industrial Relations Act, 1971, No. 36, Cap. 508.

of workers as such. The Minister (of Labour and Social Services) is empowered to order an employer to deduct from the wages of those of his employees who are members of a trade union such subscription as are prescribed by the constitution of any such trade union of which such employees are members.¹ The employer is required to remit, within fourteen days of making the deductions, the subscriptions to the ZCTU and to the trade union's headquarters.² This system enables the ZCTU and the trade union concerned receive regular contributions 'without effort' and without fail. Consequently, the ZCTU and trade unions are financially better-off than the Party, except for the Government grant made to the Party each year. In a guise of discouraging trade unions from calling illegal strike, the Regulations provided that

2. Any Deduction of Subscription Order made under sec. 20 of the Act shall be deemed revoked and shall become null and void from the day when a trade union for the benefit of which such Order is made goes on an illegal strike, whether official or unofficial.³

This was obviously a misleading provision in that 'official or unofficial' strike might include a legal strike decided upon by a positive ballot of the members of the trade union concerned.⁴ The Regulations were accordingly amended by the deletion of the phrase "whether official or unofficial" and the substitution therefor of "whether or not such illegal strike is sanctioned by the officials or executive of the trade union".⁵ The Regulations therefore, cover only illegal strikes whether the officials of the trade unions have agreed or not. Because of the bad economic situation in the country and the conflict between the Party and the ZCTU, there have been a spate of illegal strikes. It is pertinent to point out that the

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- 1. Zambia: Industrial Relations Act, 1971, sec. 20(1).
 - 2. ibid. sec. 21(1)
 - 3. Trade Unions (Deduction of Subscriptions) Regulations, 1985, Reg. 2
 - 4. Industrial Relations Act, loc. cit., sec. 116(2)
 - 5. Trade Union (Deduction of Subscriptions) Regulations,

ZCTU although it is a 'trade union' as a matter of law, it has no membership being a holding-organization of all the affiliated trade unions. It cannot, therefore, 'go on strike'. It can, however, encourage or discourage a trade union to or from going on a legal or illegal strike.¹ It has been stated that since Independence in 1964, there has been only two legal strikes, the rest have been illegal. For instance, in 1979 there were 44 illegal strikes involving 10,846 workers, in 1980 the number of strikes doubled and involved 21,921 workers and in 1981 there were 84 illegal strikes involving 46,399 workers: "In all these wildcat strikes, a total of 205,681 man-days were lost. The impact of these illegal work stoppages on the economy has been disastrous".²

There was suspicion that in its fight against the Party, the ZCTU encouraged trade unions to go on illegal strikes, hence the Party's persuasion of the Government to make the Regulations to curtail funds from trade unions and workers going to the ZCTU. The suspension of the collection and remission of subscriptions from the workers to the ZCTU have had a real impact on the funds and role of the ZCTU. It was not probably a coincidence that by the end of 1988 the ZCTU leadership was in disarray; its credibility reduced and on the verge of submitting to the dominant role of the Party. That will signal the gradual demise of what was one of the remaining (the other being the Church) organized forum for dissent and criticism of the One-Party system in Zambia.³

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1. See Chiluba v. Attorney-General (1981) ZR HN/713 (unreported) where Chiluba, as Chairman-General of the ZCTU said: " In light of all this worrying state of affairs I directed at this seminar and in accordance with Section 27 of the Industrial Relations Act, that nobody else except me as Chief spokesman of Z.C.T.U. should make statements on strike action that I held the button to set any strike in motion if there was need for one and that I would not hesitate to press the strike button if we were compelled"; Exhibit 'FPTC 1', p. 32.
 2. ibid. President K.D. Kaunda in his (dawn) address to the nation, Monday, 27th July, 1981, announcing the detention labour leaders: Exhibit 'FJCT 2', p. 38.
 3. UNIP: The inclusion of the ZMU Chairman, Timoth Walamba and the ZCTU Deputy General Secretary, John Sichone in the Central Committee of UNIP at the 10th Party Congress in August, 1988, will inhibit criticism of the Party in the labour movement in Zambia.

Section 3. The Party Committee at the Place of Work.

The view in UNIP at Independence was that Capitalism created a sort of cat-and-mouse industrial relationship between employers and employees. Workers' participation in the management of their work-places was seen as the answer to lessening tension between management and the workers. The national philosophy of Humanism adopted in 1967 introduced the notion of an industrial relations based on man-centred principles of 'industrial participatory democracy' which required cooperation between and among owners of capital and suppliers of labour, producers and the consumers etc., in the struggle against inequality, exploitation and mutual aggression.¹ Neither management nor trade unions, for instance, were to be permitted to behave as if they were above or a law unto themselves. The ideal industrial harmony was, among other things, to be achieved and maintained, through the establishment of Works Councils in all major industrial and commercial undertakings to facilitate worker-participation in management decisions, and, an Industrial Relations Court, to regulate power-play of labour or management.² The Party Committee at the Place of Work (hereinafter to be referred to as the Party Committee), is an institution devised by UNIP to establish the Party's presence at places of work: in consultation with neither management nor trade unions.

(a) The Nature of the Place of Work.

The 4th National Council of the Party,³ directed that the Party Committees should be established at places of work. Towards the end of that year it had become clear that the absence of clear instructions, the Party's resolution had been misunderstood; in some places of work

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| 1. UNIP: | <u>Report of the Second National Convention on Rural Development, Incomes, Wages and Prices in Zambia: Policy and Machinery; Kitwe, 12th-16 December, 1969, p. 21</u> |
| 2. | <u>ibid. p. 23</u> |
| 3. | 25th April, 1974 |

Party members formed Party branches instead of Party Committees. The difference between the two was that the former required enrolment of membership and election of office bearers, while the latter requires only the election of office bearers. Party branches aroused suspicions among management who saw these organizations as potential sources of unrest at places of work or would wrest control from them or even undermine their authority. The Party functionaries at the constituency level (the present ward), branch and even section levels, on their part, saw in the Party branches at place of work as possible substitutes to their own organizations. Under such suspicions and anticipations, the Party presence at place of work could not continue without clarification and regulation.

The national policies of the Party required that the Party intensified its efforts at strengthening good industrial relations in all the sectors of the economy and guarantee peace, stability and high productivity. The task of achieving this was in part assigned to the Party itself, accordingly, the Party Constitution adopted in 1978, provided for the establishment of the Party Committee composed of a Chairman, a Secretary and two other members, to hold office for two years. The Committee works and is supervised under and by the DG on the area in which the enterprise at which the Party Committee is established, is located.¹ A place of work is difficult to define or describe; for instance, at a market place, a place where a group of men repair motor vehicles qualifies as a place of work and a Party Committee could be formed there, while in the same place where men or women sell food-stuffs or cloth, might not qualify as a place of work; only a branch or section of the Party could be formed at such a place. Between 1983 and 1985 the Speaker of the National

1. UNIP;

Constitution, 1978, Art. 30, now Art. 30,
Constitution, 1988.

Assembly successfully resisted the establishment of a Party Committee at the National Assembly on the ground that Parliament was not a place of work for MPs. That was a curious argument because, prima facie, the National Assembly is an institution where a number of persons, together with MPs, work. It was obvious that the Speaker was opposed to the presence of UNIP within the precincts of Parliament. He succeeded mainly because the decision as to what constitutes a 'place of work', is made by the local DG, who, although a Presidential representative at district level, is junior officer to the Speaker of the National Assembly.

(b) Functions of the Party Committee.

The Party Committee is now one of the important instruments of the One-Party system. Under a multi-party system it would be intolerable to all concerned if several political parties formed their party committees at places of work. The functions of the Party Committee also show that these can be carried out more effectively under a one-party than under a multi-party system. The Party Committees are formed in the Party, the Government and parastatal institutions as well as in private enterprises. The functions of the Party Committee are

- (a) to work with management in ensuring that enterprises operate in accordance with the aims and objects of the Party;
- (b) to assist management in strict business and enforcement of discipline at places of work;
- (c) to work in close collaboration with trade unions to encourage hard work and high levels of production;
- (d) to ensure that Party programmes are adhered to and implemented by enterprises;
- (e) to ensure that Party members live by exemplary behaviour in accordance with Party discipline; and
- (f) to instil political and ideological education in the minds of workers and security consciousness against crime, subversion and sabotage.¹

The Party Committee's Chairman, Secretary and the other two members² have to be employees of the enterprise where the Committee is formed. In order to be effective, the Committee members have to work in close contact

1. UNIP: Constitution, 1988, Reg. 30
 2. ibid. Art. 30(1) (a) to (c)

with the DG in order to be familiar with the aims, objects and programmes of the Party. In most cases persons elected to the Party Committee are often familiar with the Party policies because some of them already hold Party posts at either Section or Branch level in their residential areas.

(c) Multiplicity of Organizations at Place of Work.

The Zambian place of work is crowded with organizations; in addition to the Party Committee, every industrial and commercial enterprise employing more than one hundred employees is required to establish a Works Council¹ composed of management and trade union representatives.² Thus, at every work-place should have a trade union branch, a works council, management and a Party Committee. While the Party, Government and parastatals were eager to establish the Party Committee, private enterprises were lukewarm and in some cases resisted the formation of the Party Committees. Private enterprises viewed Party Committees as bodies formed by the Party to show its lack of confidence in private enterprise as an ally of the Party in the implementation of its economic policies. The relationship between the Party Committee and trade unions at a place of work would be anything from cordiality to hostility.

The multiplicity of organizations at place of work has not brought about industrial peace, harmony or high productivity. Instead, illegal strikes have been on the increase. The Party Committee is composed of workers employed at the place of work and as such they are bound to support any strike action taken in the furtherance of the improvement of workers' pay or conditions of employment. The Party Committee can keep the Party well informed of the causes of illegal strike where it occurs but it cannot stop any illegal strike.

1. On Works Councils see: Finch, R., and Zulu, G.; "Labour and Participation in Zambia", in Turok, B. (Ed.), Development in Zambia: A Reader; Zed Press, London, 1979, pp. 214 - 226.

2. Zambia: Industrial Relations Act, 1971, sec. 55.

(d) Some Legal Problems.

One of the reasons why the Party Committees have not been able to stop illegal strikes, is their want of legal status. The following case will illustrate this point. The Minutes of a Party Committee at a parastatal organization in Lusaka stated that when two vacancies occurred on the works council of the parastatal, the Party Committee nominated two candidates to contest an election to fill the vacancies. A local trade union objected to the Party Committee's nomination contending that under the Industrial Relations Act, 1971, nomination to fill a vacancy on a works council can only be made by a trade union, or with the approval of a trade union. The Party Committee took this as a challenge to the 'supremacy' of the Party and an attempt by the trade union and management to ensure that the vacancies were filled by 'counter revolutionaries'.

Although Art. 4 of the Constitution of Zambia Act, 1973, establishes a One-Party system and the Party's supremacy is also backed by law,¹ most of the laws of Zambia were not reviewed to facilitate the smooth operation of the system. The Industrial Relations Act is one of those laws which needed review. Its provision that only the trade union should nominate a candidate for election to a works council,² was made before the introduction of the One-Party system and the establishment of the Party Committee. The Party Committee relied on the provisions of the Constitution of the Party which provided that a Party member's rights included the right "to elect or to be elected or appointed to the leadership in the organ of the Party, the Government and the State",³ and argued that in the context of the supremacy of the Party, the provisions of the Industrial Relations Act should be read in conjunction with (or subject to) the provisions of the Constitution of the Party.

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| 1. Zambia: | Constitution of Zambia) Amendment Act, 1975, No. 22, Art. 47C(2) |
| 2. | Industrial Relations Act, 1971, sec. 59(1) |
| 3. UNIP: | Constitution, 1978, Art. 15(a), now Art. 17(a), Constitution, 1988. |

The Works Council is not an organ of the Party, or of the Government or of the State, although the parastatal organization itself is a State-owned institution. The cited provisions of the Constitution of the Party could not support the Party Committee's claim to nominate the two candidates. What was in issue in this case was the status of both the Party and the Party Committee. The ZCTU in rejecting being designated a mass organization of UNIP in 1978 and 1983 emphasised the point that the ZCTU operated under the provisions of the Industrial Relations Act thereby implying that it had a legal status independent (and superior to that) of the Party. The Party Committee was therefore, confronted with a legal problem it could not resolve. The Minutes of the Party Committee accordingly recorded that the Committee resolved as follows, viz

- (1) That whilst observing its given responsibility,¹ i.e. being one of the supervisors for these subsequent works council elections, but fearing to be seen interfering with the functions of other organs, a legal interpretation of how Chapter I Article 15, constitution of the Party could be implemented, be sought in relation to eradicating the observed counter revolutionary act committed by abuse of the said legal right of the union.
- (2) That the Party Committee appeal to the Party.
- (3) That the two Party Committee members follow the laid down procedure under the Industrial Relations Act for a Court injunction and non-conduction of election.²

According to the prevailing positivist view of law in Zambia, the Constitution of UNIP is not a source of law, accordingly, its Art. 15 could not be invoked to modify or qualify or over-ride the provisions of

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1. Zambia: Section 60, Industrial Relations Act, provides that subsequent elections to works council can be supervised by persons appointed by the out-going members of the council. The Party Committee was accordingly appointed supervisor.
 2. On Works Council elections and appeals to the Industrial Relations Court, see Samusunse v. Printpak and Times Newspapers Ltd. Works Council (1979) 1 ZIRC (1979-81), 197, in which a works council election was nullified for irregularities in the distribution of election ballot papers.

the Industrial Relations Act, sec. 59(1). Accordingly, the Party committee could not nominate the candidates, or, could only do so with the prior approval of the trade union. That was the 'supremacy' not of the Party but of the trade union.

The legal position of the Party Committee remains uncertain as that of the Party itself. One way of clarifying the role of the Party Committee would be through its inclusion in the Industrial Relations Act, that is, to 'legalize' it. Such similar approach has been adopted, for instance, the insertion of the provisions of Art. 37 of the Party Constitution as sec. 10 of the Local Administration Act, 1980.¹ Such devices might create rather than solve legal problems. If provisions of the Constitution of the Party are included in statutes passed by Parliament, Parliament would be in a position to indirectly amend the Constitution of the Party, contrary to the provision of that Constitution that it can only be amended by the Party Congress.² So far UNIP has not been able to resolve the question of the legal status of the Party.

The 4th National Council of the Party,³ resolved that the system of registering Branches of the Party should be reviewed with a view to exempting them from registration under the Societies Act. That resolution impliedly queried whether the Party itself should be subject to the provisions of the Societies Act. Consideration was given to the possibility of legislating that the Party be turned into a body corporate. Enactment of such legislation would have meant that Parliament review the very existence of the Party itself, "a measure which was regarded as not in the best interest of the Party itself".⁴ The review was accordingly, not carried out and the Party Headquarters and Branches are still

1. Zambia: 1980, No. 15; supra, p. 357.

2. UNIP: Constitution, 1988, Art. 87(1) (a) to (c).

3. 25th April, 1974

4. Progress Report for the Years 1973-1978; p. 11

subject to registration under the Societies Act, as societies.

The Party Committee performs political functions, among these, that of ensuring that a place of work, be it in the Party, the Government, a parastatal organization or a private enterprise, is not used as a forum for activities contrary to State security or opposed to the Party and its Government; hence, it is viewed by both the labour movement and management as a 'spying agent' of the Party. In Tanzania an equivalent body to the Party Committee received similar suspicion from management, though it received support from the workers:

Despite the employer's policy of divide and rule, the workers attained maximum revolutionary consciousness. This silent fire found manifestation in the primary workers' demand for the formation of a TANU Branch at the factory. This request was made by the workers' committee. For the first time in the history of the Workers' Committee, the Workers' Committee had demanded the coming of TANU near it. Often workers' Committees are hostile to TANU branches.

The employer knew, more than anybody, the dangers of opening a TANU Branch at the factory. But it was not in his power to say so.¹

The political party as well as the trade union are organizations imported into Africa initially to serve European interests; their origins are deep-rooted in the Western political and economic traditions and philosophies based on the laissez faire in political, economic and social activities. In European democratic political theory and practice, a political party should represent only a section of the community in which it operates. A trade union, by its very nature, represents only a section of workers engaged in a certain economic activity. In the African One-Party states, the national political organization which is called the 'party', is not built upon sectional interests, but purportedly upon a national basis. Ideally, the Party Committee could be used as

1. Mihyo, P.B., "Labour Unrest and the Quest for Workers' Control in Tanzania: Three Case Studies", EALR, Vol. 7, No. 1, 1974, p. 31. In Tanzania the Workers' Committees were established under the provisions of the Security of Employment Act, 1964, No. 62, Cap. 574.

an institution of liberal education for better citizenship, as an important organ of the Party in educating workers on the workings of the larger political system and/or economic management of industrial and commercial enterprises as well as the administrative machinery of the Party and its Government. It is for that reason that one would not support turning of a political party into a body corporate, e.g. ZANU-PF's constitutional provision to the effect that

The Party shall be a body corporate capable of suing and being sued; owning and disposing of property; and engaging in all such lawful activities as are consistent with the aims and objects of the Party.¹

Trade unions are not bodies corporate; often they are only afforded a limited legal capacity by legislation.² They cannot be wound-up like a company. A political party that possessed the legal status of a body corporate might be a subject of winding-up proceedings, e.g. in Chipimo v. Chona, the Secretary-General of UNIP and Attorney-General³ the High Court had awarded the plaintiff K1,000,000 for defamation. The Supreme Court ruled that the Secretary-General could not be sued in his official capacity. If UNIP were a body corporate and had failed to pay such damages, it might have ended in winding-up proceedings. Political parties and trade unions should be regulated by their own special legal regimes; in essence not as bodies corporate.

(e) Reform of Industrial Management.

Zambia's economy has been on the decline, coincidentally, since the introduction of the One-Party system; reportedly adversely affected by a steady fall in the price of copper, which is the country's chief earner of foreign currency. Zambia is still dependent on some imports of essential commodities such as fuel, medicines and food stuffs, e.g. wheat. Some of the major industrial and commercial enterprises at which the Party Committees are formed and operate are not State-owned but are still outposts of some

1. ZANU-PF: Constitution, 1984, Art. 2.

2. Zambia: Industrial Relations Act, 1971, sec. 3(2).

3. (1983) ZR 125, supra, p. 200.

foreign trading multi-nationals whose products are depended on inputs imported from outside Zambia. To make up for some shortfall in the foreign exchange requirements, the Party and its Government have to resort to loans and bilateral and multilateral aid or grants. Under these economic conditions, the Party and its Government have strived to curb undue consumption of foreign exchange and to withhold certain subsidies paid by the Government on consumer goods. That have resulted in price increases beyond the reach of most of the workers. Trade unions have advised the Party and Government on the performance of their enterprises, inflation, redundancies, closure of industries or factories and effects of shortages of essential commodities on labour stability and productivity. Trade unions play the critical role of telling the Party of the dangers or shortcomings in Party policies and in the performance of industrial and commercial undertakings. The Party's attitude, however, has been to regard the trade unions' criticism as opposition or hostility to Party's leadership or that the criticisms give a bad impression of the Party's performance in the eyes of the outside world and might work as a deterrence to attracting foreign investments in Zambia.

The Party Committee in most cases defends Party and/or Government measures. The Party Committee cannot monitor or represent workers' grievances or interests. A strong and well-organized labour movement is still essential in Zambian economic fields. The Party's policy to achieve qualitative transformation of the social life of the Zambian people cannot be carried out without the support of the organized labour and management. The Party makes a number of proposals towards the achievement of 'industrial participatory democracy'; first, the Party proposes a reform of industrial and commercial management.

The future management is projected to be a three-corner type of management consisting of

- (i) Management,
- (ii) Representatives of the Party Committee at Place of Work, and
- (iii) Representatives of Trade Unions and Works Council.

These three, working together, would form a common management committee. This approach would be viable insurance against unmitigated problems that arise from failure of consultation.¹

The Party would, in all probability, assume the chairmanship of such an organization to ensure not the efficiency of the management committee, but its leading role. Foreign multi-nationals used to freedom of action in the economic field, would find such an arrangement rather restrictive. The second proposal is that the Industrial Relations Act, 1971, should be reviewed to ensure greater industrial harmony by incorporating in it some of the Party's concepts of industrial participatory democracy while rationalising the relationship between trade unions, the works council and the Party Committee and streamlining the administration of the Act.² This means bringing trade unions in general and the ZCTU in particular, under the leadership of the Party through legislation. The emergence of the Party Committee had, in most institutions, the effect of forcing trade unions to side with management, particularly in the private enterprises. In Government and parastatal organizations, the Party Committee was assimilated into the Government bureaucracy while local trade unions played the role of 'opposition'. Precisely because trade unions are highly organized, they have been able to act independently of the Party Committee. Any elimination of that independence will signal the end of trade unions' freedom of organization in Zambia.

1. Kaunda, K.D., Economic Power to the People, Part One and Two; Government Printer, Lusaka, 1983, p. 10.

2. UNIP: The National Policies for the Decade 1985-1995 : Aims and Objects of the Third Phase of the Party Programme; Government Printer, Lusaka, 1985, p. 14.

CONCLUSION.

This Chapter has considered the collateral development of African political and labour organization in Zambia and their relationship before and after Independence and showed that trade unionism emerged in the context of legislation and practices which favoured the development of a neutral non-politicized labour movement. The convergence which occurred between the two movements before Independence, was not based on any precise theory of interactive political linkage but was necessitated by the prevailing colonial situation which compelled the Africans to combine their efforts in demanding some basic political and economic rights: that they could have done either by acts of individual persons or by relying on one dominant person or group. The political parties and trade unions provided some form of organs for the acquisition and protection of African interests. After Independence, the Zambians came to master their own environment; they were able to stand back a little and consider what they really wanted out of life beyond mere survival. It is evident that in every society different people demand different things, e.g. types of housing, education, clothes or system of government. That is, where there is freedom of choice.

Where one individual, or group, were dominant, some of these different demands are likely to be subordinated to the wishes of that individual or group. The establishment of the One-Party system in Zambia, subordinated the form of government to be practised in Zambia to the wishes of UNIP. The failure to designate the ZCTU as a mass organ of the Party arises from the ZCTU's refusal to accept the principle that subordination was the price public institutions were to pay for the protection provided by UNIP through its Government. The conflict persists because, first, the parties have not agreed on the ways of co-existing peacefully: each side will have to be persuaded to give something up to accommodate the wishes of the other. Obviously, the ZCTU would have to accept the dominant role of the Party rather than being phased out.

Secondly, the failure to designate the ZCTU as an organ of UNIP was not caused by ideological differences between the elite in the leadership of these two organizations, but by the historical background of the two movements and the ZCTU's opposition to the One-Party system in Zambia. The designation is perceived by some of the ZCTU leaders as an act intended to legitimize a system they do not wholly support. While the One-Party system continues in existence, some of the ZCTU leaders would like to be seen as providing an independent alternative leadership to UNIP's leadership. At the same time, there is a feeling among some of the ZCTU leadership that in the event of the country reverting to a multi-party system, the ZCTU should be free to retain its independence or support any other political party other than UNIP.

The conflict, therefore, arises from many factors. The ZCTU fails to realize that a one-party system, while it exists, is an oligarchical system from which a popular labour movement cannot be allowed to exist independently of the ruling party. Under a multi-party system, for instance as that existing in the UK, trade unions can exist independently of political party affiliation. Thus, although the TUC and most of trade unions are affiliated to the Labour Party, the National and Local Government Officers' Association is not affiliated to the Labour Party.¹ The recent trends in the UK have been to weaken the relationship between trade unions and political parties, in particular the Labour Party. For instance, in Leigh v. National Union of Railwaymen,² it was held that the defendant trade union was not entitled to demand that any candidate for the post of President of the Union should be a member of the Labour Party in spite of the Union's rule that the president of the Union had to attend TUC's and Labour Party's annual conferences. The Court's view was that that rule did not require that a person seeking election to that post had to be a member of the Party before nomination. He could become a member of the Labour Party after his election as the President of the Union.

1. Lewis, L. (Ed.) Labour Law in Britain; Blackwell, 1986, p. 304.

2. /1971/ 2 QBD 175

The Trade Union Act, 1984,¹ now provides that no candidate for election to a trade union executive committee should be required to be a member of a political party.² Such provision clarifies the legal position vis-à-vis the requirement of membership of a political party and the holding of an executive post in a trade union in a multi-party system but under a one-party system based on the central role of the ruling party the loyalty of trade unions and their members is required to be committed to the one party. The ZCTU's resistance to be designated a mass organ of UNIP is not on the basis that the latter is socialist and itself supports capitalism, but that it would prefer to exist and operate as an independent labour movement. The conflict - and contradiction - arises from the ZCTU's involvement in political confrontation with the Party. Designation is aimed at stopping just that confrontation.

Thirdly, the legal status of the ZCTU and UNIP contributes to the conflict between the two organizations. The labour movement has had a strong legal basis which the political movement has never had. The judiciary's intervention in the conflict between the ZCTU and UNIP which it viewed as nothing but political and personalities-clash, was bold but it solved nothing. The courts upheld the rule of law and the freedom of expression, that is to say, freedom to hold opinions without interference and to communicate ideas and information to the public or any person or class of persons again without interference. What was in issue in the ZCTU cases was not freedom of expression, but whether the ZCTU platform could be used for political agitation, for instance, the (lawful) overthrow of the Government. In the absence of alternative political organization to the ruling one party, the labour movement inevitably becomes the only avenue for organized dissent to the Party.

1. UK: 1984, c. 49.

2. ibid. sec. 2(10).

CHAPTER X.

UNIP'S ROLE IN FORMULATION AND IMPLEMENTATION OF FOREIGN POLICY.

Pan-Africanism and Legal Status of Liberation Movements.

Introduction.

The foreign policy of any country, broadly conceived, is a series of articulated principles regulating its role and demands on the international system of sovereign states. These principles are invariably internally generated and determined in the context of or in response to external events and situations over which the country, big and powerful or small and weak, has no control. A foreign policy of any country, therefore, is determined by internal and external factors. Usually the organ that formulates the foreign policy of a country is a political party which it implements in its corporate name of Government. Where there is no political party system, for instance, under a military rule, the ruling junta alone or in consultation with the civilian population¹ determines the policy. Although formulation and implementation of foreign policy is a matter concerned with sovereign states relationship, this Chapter looks at UNIP's role in 'international affairs' before and after Independence. The emphasis, however, is more on the legal than political aspects of the Party's role in these matters.

Chapter Two of this study has shown that Zambia is a creation of British colonialism. As a unified 'country', its historical evolution goes back to just eighty years. For it was in 1911 that the British government, at the instance of the BSAC, created NR as a protectorate of Britain.² The British Government took over the

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1. Nigeria: See Nigerian Journal of Internal of International Affairs, Vol. 12, Nos. 1 & 2, 1986, pp. 18-22 on Kuru Conference of the All-Nigerian Conference on Foreign Policy at which civilians discussed the foreign policy to be pursued by the military or future civil administration.
 2. Supra, p. 45.

administration of the country from the BSAC in 1924. The Imperial Power, the UK, was responsible for the internal peace, order and good government and the external defence and 'foreign affairs' or relations of NR. The Crown was represented in NR by the Governor whose functions were spelt out in the Royal Instructions.¹ Foreign relations were, however, matters reserved to the Crown, for e.g. a Governor's assent to legislation was valid unless, among other things, the Bill was contrary to the Crown's obligations "imposed upon US by Treaty".² The Royal Prerogative, a term which describes the residue of personal powers of the monarch, includes the power to conclude foreign relations, for instance, entering into treaties, control of the armed forces, declaration of war or conclusion of peace. The exercise of such prerogative functions is done by the Prime Minister and members of the Cabinet; the elected Government of the day and the monarch merely assents. Colonial possessions had no foreign policy of their own; the colonizing power's foreign policy was the policy within which protectorates such as NR were administered. The Governor, however, being the representative of the Crown, possessed and exercised some prerogative powers, for instance, he controlled the local armed forces - the King's army - e.g. the King's African Rifles.

After Independence the Governor's prerogative powers were assumed by the President.³ UNIP's role - or that of its President - cannot be understood without a brief reference to the Party's experiences before Independence. This Chapter is, accordingly, divided into three broad Sections; the first Section looks at the pan-Africanist movement and the colonial administrators' reaction to its spread to Central Africa, the second Section examines UNIP's role in the formulation and implementation of Zambia's foreign policy and the third Section is on liberation movements and fraternal parties and their personnel in Zambian law.

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1. UK: Northern Rhodesia (Legislative Council) Order in Council, 1924, sec. 25; Chitambala v. The Queen (1957) NR LR 29 at p. 44.
 2. ibid. Clause 16(9) of the Royal Instructions, 1924.
 3. Zambia: Constitution of Zambia Act, 1973, Art. 7, Cap. 1, Applied Laws.

Section 1. Pan-Africanism and its Spread to Central Africa.

The pan-African movement in Europe launched its first anti-colonialism campaign in Paris in February, 1919, to coincide with the Peace Conference at the end of the First World War and the establishment of the League of Nations. At that Peace Conference, the campaigners advocated for an alternative system to colonial rule as regards the future administration of the former African territories of Germany. That pressure contributed to the establishment of the mandated territory system¹ under which former Germany African territories were placed under the administration of one of the victor nations, for instance, Tanganyika was placed under UK administration. Prima facie, mandated territory system was a mere change of colonial rulers. The pan-African movement's conferences held between 1919 and 1945, were concerned with such matters as the allocation of land to indigenous peoples and their right to participate in economic and political affairs of their territory. The Fifth pan-African conference held in Manchester, England, in August 1945, coincided with the establishment of another international organization, the UNO, which introduced the Trusteeship system in place of the mandatory system of the League of Nations. The pressure in 1945 was for self-determination for the colonial people as a whole and not necessarily for those in former colonial possessions of the defeated European Powers.²

The pan-African movement did not advocate policies which free African states should pursue. The movement, however, provided a forum for contact and exchange of views between and among future

1. Louise, W.R., "The African Origins of the Mandate", 19 International Organizations; 1965, 20.

2. DuBois, W.E.B., "The Pan-African Movement", in Kedourie, E., Nationalism in Asia and Africa; New American Library, N.Y., 1970, pp. 372-387. See also Padmore, G., Colonial and Coloured Unity; Manchester UP, 1958, pp. 13-26.

African leaders some of whom on return to Africa formed or led political organizations that went into the actual struggle to achieve self-determination for their country and people, for instance, in Ghana,¹ Kenya,² Malawi,³ and Zambia.⁴ Some of the African leaders began their agitation for the self-determination of their people while still in Europe, for instance Dr Banda and Nkumbula in 1949 presented to the British Government a memorandum in which they indicated that the African people of Nyasaland (Malawi) and NR (Zambia) were opposed to the projected federation of SR, NR and Nyasaland.⁵ The League of Nations in its Covenant did not provide for self-determination of either those living under the Mandatory system or colonial rule in Africa, instead, for the former it was provided that those people, especially in Central Africa, should be guaranteed freedom of conscience and religion subject only to the maintenance of public order and morals.⁶ The UNO Charter, however, provided that Member States of the Organization which had or assumed responsibility for the administration of non-self-governing territories whose people had not yet attained a full measure of self-government, recognize the principle that the interests of the inhabitants of those territories were paramount and accept as a sacred trust the obligation to promote to the utmost, inter alia, the development of self-government, to assist them in the progressive development of their political institutions according to the particular circumstances of each territory.⁷ Colonial powers were, while in the process of

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| 1. Ghana: | Kwame Nkrumah, the CPP. |
| 2. Kenya: | Mzee Jomo Kenyatta, KANU. |
| 3. Malawi: | Ngwazi Dr Kamuzu H. Banda, MCP. |
| 4. Zambia: | Harry Mwaanga Nkumbula, NRANC; <u>supra</u> , p. 63. |
| 5. UK: | <u>Report of the Nyasaland Commission of Inquiry; Cmd. 1959/814, p. 10. (Chairman: Mr Justice Patrick Devlin).</u> |
| 6. League of Nations: | Covenant, League of Nations, 1919, Art. 22(5) |
| 7. UN: | United Nations Charter, 1945, Art. 73(b); <u>infra</u> , p. 467. |

decolonization, required to assist the colonial people. Consequently, the colonial powers could assist the colonial people only through their political and economic policies and practices. Since almost all colonial powers were capitalist, development towards African self-government was to be on the basis of that system. Pan-African cooperation, however, was something which the Africans had to pursue on their own pattern.

On his return to NR, Nkumbula was elected President of the NRAC which he renamed the NRANC in 1953. The constitution of the NRANC provided among its aims and objects the following, ie

- (b) To act, whether alone or in cooperation with other bodies and persons, as the mouth-piece and representative, whether inside the Territory or beyond, of all Africans in the Territory; and to affiliate with kindred bodies or organisations, whether in the Territory or beyond.¹

Article 2(k) of the constitution provided that Congress could send delegations to attend conferences and discussions wherever held where matters of interest to Africans were to be discussed. The central theme of discussion during this period among Africans was the method of ending colonial rule and achieving independence. Questions of what policy to be adopted after achieving self-government or independence were premature. The ZANC, the splinter group from NRANC, adopted in its 1958 constitution in toto the provisions of the NRANC's Art. 2 and added three Clauses, one of which provided for commitment to "pan-Africanism, inter-Commonwealth relations, and, international cooperation in accordance with the Declaration of the Universal Human Rights and the United Nations Charter."² Most of these provisions were

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1. NRANC: constitution, 1953, Art. 2; supra, p. 63.
2. UNIP: Northern Rhodesia, Proposals for Constitutional Reform as Submitted by Zambia to the British Imperial Government, 4th February, 1959; constitution of ZANC, 1959, Art. 5(iv) (2) and (3), supra, p. 73.

aimed at contrasting the manner the colonial power administered the territory and the 'democratic way' the party would run it after achieving self-government. Having never had any experience in administering anything larger than the party annual conference, the claim to administer the territory in accordance with Charter of the UN was rhetoric. However, the provision on political cooperation was realistic. At the All-African Peoples' Conference held in Accra, Ghana, in 1958, J.M. Nkomo (SRANC), K.D. Kaunda (ZANC), H.M. Nkumbula (NRANC) and H.K. Banda (NANC), signed the Charter of Unity in which they agreed to establish a broad-based united front linking up various political and industrial organizations "in our respective countries and also to coordinate our activities with those in East Africa to win self-government and national independence for our people."¹ But this pan-African coordination or gesture was a reaction to white settlers' pan-Sub-Sahara self-government and dominion status moves. DuBois had in fact noted in 1945 that there was a paradox at the San Francisco conference where UNO was launched and the provisions were formally adopted, inter alia providing for self-determination for non-self-governing territories, that Jan Smuts, the South African leader had pleaded for an article on 'human rights' to be included in the Charter:

The Pan-African movement which he represents is a union of the white rulers of Kenya, Rhodesia and the Union of South Africa, to rule the African continent in the interests of the white investors and exploiters. This plan has been incubating since 1921, but has been discouraged by the British Colonial Office. Smuts is now pushing it again, and the white legislatures in Africa have asked for it.²

In Central Africa in 1953 the British Government had given in to white pan-Africanism by the establishment of the Federation³ of

1. Krishnamurthy, B.S., Cha Cha Cha, Zambia's Struggle for Independence; File 2/Doc. 15; Oxford UP, Lusaka, 1972.

2. DuBois, W.E.B., op. cit., p. 387.

3. Supra, p. 66.

Rhodesia and Nyasaland. The Charter of Unity marked the highest point in pan-African cooperation among Africans in Central Africa; its actual practical significance was, however, exaggerated by the colonial administrators and settlers probably to justify the draconian measures taken against the signatories of the Charter. African unity was forged by the fact that European-rule was imposed on the Central African region at the end of the nineteenth century which led to the influx of Europeans and Asians who dominated the administration, the economy and political life and subjected Africans to racial segregation and impeded their participation in the social and economic as well as the political life of their country. Consequently, African unity or pan-Africanism, took the form of anti-colonial nationalism. Settler domination and racism contributed towards the unification of ideals of the nationalist movements.

(a) Nyasaland (now Malawi).

The signing of the Charter of Unity at the Accra, Ghana, conference, was cited as one of the causes of unrest in the Protectorate.¹ The Governor in pursuance of his powers under the Emergency Powers Order in Council, 1939 and 1956, which gave him extensive control over persons and property in the country, on the 3rd of March, 1959, made the Emergency Regulations, 1959, to deal with the country-wide African opposition to the Federation and demand for self-government. The Governor in Council had power under secs. 70 and 72 of the Penal Code to declare any society to be dangerous to the good government of the Protectorate. Accordingly, on the 3rd of March, aforementioned, using the powers vested in him by the Emergency Regulations and the Penal Code, declared the NANC an unlawful society and any person who continued to claim to be a member of the NANC or carry out its functions, was liable under the provisions of the Penal

1. UK:

Report of the Nyasaland Commission of Inquiry, op. cit., p. 41. The Commission was set up under the Nyasaland (Commission of Inquiry) Order in Council, 1959, S.I. 1959/624.

Code, to imprisonment for a period of up to seven years. Among the accusations levelled against the NANC and the justification for its proscription was that the NANC was engaged in arranging a 'summit conference' to be attended by delegates from SRANC, NRANC, ZANC and itself to coordinate African opposition to the Federation and colonial rule in Central Africa in accordance with the Accra Charter of Unity.¹ In reality the NANC did not need a 'bush conference' to coordinate its activities with the other African Congress because Nyasaland's economy being basically agricultural, a large number of Nyasas were working in SR and NR in which countries it had some of its strongest branches both in terms of membership and funds. The NANC, however, was the loudest critic of the Federation and with the return of Dr Banda to the territory on 6th July, 1958, the tempo of political agitation increased. Most leaders of the NANC were placed under detention; Banda in SR. He was released in April, 1960.

The Commission of inquiry found that there was no evidence that there had been any conspiracy on the part of Africans to subvert the government of Nyasaland as it had been alleged by its Governor, Sir Robert Armitage and the Federal Prime Minister, Sir Roy Welensky.² On the European side, the ruling UFP and the CAP³ were both united in their demand for immediate transfer of power into the hands of the white minority. It was the fear of political power being given to the settlers that united African political parties rather than mere implementation of pan-Africanism. To most African leaders pan-Africanism was seen as a

1. UK: Report of the Nyasaland Commission of Inquiry, 1959;
op. cit., p. 84, sec. 3, par. 168.

2. ibid. Subversive activities' of NANC listed by the Governor of Nyasaland in the Governor's despatch dated 18th March, 1959, and later published as a White Paper, included meetings of leaders of the four African Congresses; p. 70, par. 138.

3. Central Africa Party, later changed its name to the Liberal Party; supra, p. 80.

tool with which to achieve international support for their struggle for self-determination and not as a weapon for territorial expansionism or interference in each others' internal affairs before or after achieving self-rule; it provided a basis for future foreign policies and practices.

(b) SR (now Zimbabwe).

The contemporary erroneous view was that the African in SR was in any case worse off under that country's Native Policy than the African under CO rule in Nyasaland and NR that the imposition of the Federation did not make any difference to his political future. The SR Africans opposed the Federation as they saw the Federation as further institutionalization of foreign settler rule. The leaders of SRANC who participated in the Charter of Unity in Accra, mainly Nkomo and his fellow officials were detained under the provisions of the Preventive Detention (Temporary Provisions) Act, 1959, sec. 3(5). The grounds for detention supplied to the detainees, stated inter alia,

(a) That the abovenamed detained person has been associated with or has supported directly or indirectly the activities of the Southern Rhodesia African National Congress which led to the state of emergency.¹

The SRANC was founded on 12th September, 1957. The Tribunal appointed to review the detention of the SRANC leaders stated that the SRANC cooperated with the NANC, the NRANC and ZANC and that "Whether or not cooperation and coordination of activities with these organisations is a subversive object must depend on the activities of these organisations themselves" and observed that these Congresses had been proscribed (with the exception of the NRANC) as subversive organisations in their country of origin. The view of the Commission of Inquiry, however, was that the Government (of Nyasaland) "overestimated the

1. SR: Review Tribunal (Preventive Detention (Temporary Provisions) Act, 1959), General Report, 1959; p. 7, par. 17.)President: T.H.W. Beadle.)

extent to which the idea of violence had penetrated Congress; and underestimated the impact which their own emphatic action would have on the minds of persons who were normally law-abiding."¹ Basing its conclusion on the fact that the Northern Congresses had been proscribed, the Tribunal accepted

the fact that Nyasaland African National Congress and Zambia African National Congress are subversive organisations committed to a policy of violence in achieving their objectives, the extent of which the Southern Rhodesia African National Congress has been working with these organisations become a matter of comment.²

The Charter of Unity was signed on the 18th December, 1958 and the Congresses were proscribed in March, 1959, before the 'summit conference' they had intended to hold and at which to launch a 'combined action' was held. The authorities, therefore, adopted a preventive approach. The Tribunal's view of the proscription of SRANC and the detention of its leaders was that the organization was prima facie subversive and accepted "as an established fact that there was a state of emergency, and that the activities of the Southern Rhodesia African National Congress were responsible for declaring it" and that "all the allegations contained in the Minister's statement of particulars in the general case against the Southern Rhodesia African National Congress are proved."³

The Tribunal divided the SRANC's activities into two groups; first, those which fell within its constitution, which it termed 'official objects', and, second, activities not provided for in its constitution, which it termed, 'subversive objects'. In the grounds for detention supplied to each of the SRANC detainees by the Minister (of Law and Order), the detaining authority, SRANC's activities which involved some

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| 1. UK: | <u>Report of the Nyasaland Commission of Inquiry, 1959; op. cit., p. 127, par. 256.</u> |
| 2. SR: | <u>Review Tribunal, General Report, 1959; op. cit., pp. 18 - 19, par. 45.</u> |
| 3. | <u>ibid.</u> p. 24, par. 51. |

cooperation "with the Nyasaland African National Congress, the Zambia African National Congress and the Northern Rhodesia African Congress and to coordinate its activities with those organisations" were branded subversive activities.¹ The actions of the authorities in SR like those in Nyasaland purported to nip in the bud any pan-African activities in the Federation. On the face of it, there was an aspect of contradiction on the part of the Congresses' opposition of the Federation which prima facie was a pan-African venture, the association of three territories. The Federation had brought together 8,000,000 Africans and 260,000 Europeans. The raison d'etre for the establishment of the Federation was given by its protagonists as mainly economic; Nyasaland were to enjoy cash subsidy from the two Rhodesias and the two Rhodesias would benefit from greater investment attractions of the Federation.² This possibility of a prosperous Federation was not disputed by those opposed to it. Their answer was that the Federation was a white settler-pan-Africanism established to thwart African pan-Africanism. Africans therefore did not seriously address their minds to the economic benefits likely to accrue from the venture.

(c) NR: (now Zambia).

Although the Legislative Council was established in SR and Nyasaland in 1911 and in NR in 1924 that did not stimulate immediate African interest in formation of political parties or emergence of pan-Africanism to consolidate African opposition to colonial rule. The NANC appeared in 1944,³ the NRANC in 1948 and the SRANC in 1957. The appointment of the Bledisloe Commission in 1939 to examine the possibility of federating the three territories, triggered African political awakening which placed them in a rather awkward situation

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1. SR: Review Tribunal, General Report, 1959; op. cit.
p. 9, par. 24.
 2. Supra, pp. 66 and 82.
 3. Supra, p. 62.

in which they were united in order to be 'divided'. In NR the Safeguard of Elections and Public Safety Regulations, 1959,¹ made under the Emergency Powers Ordinance, 1957,² provided that if at any time the Governor was satisfied that any action had been taken or was immediately threatened by any person or body of persons calculated to create or lead to a situation in which the Governor would be empowered to declare a state of emergency or would probably create or lead to such a situation, he might make regulations prohibiting, restricting or otherwise regulating any such action.³ The Tribunal appointed to inquire into the causes that led to the making of the Regulations and the subsequent proscription of ZANC and the detention of its leaders, found that the making of the Regulations was justified.⁴ The justification was based on the reports and events following the signing of the Accra Charter of Unity and the calling of a 'summit conference' by the four signatory Congresses at which it was anticipated joint action against the Federation was to be discussed. The Federation was therefore, the catalyst of pan-Africanism and 'foreign relations' in Central Africa.

There is no doubt that the enactment of the Emergency Powers Regulations, 1959, in Nyasaland, the Preventive Detention (Temporary Provisions) Act, 1959, in SR and the Safeguard of Elections and Public Safety Regulations, 1959, in NR, were not isolated acts or a mere coincidence or independent of each other, but concerted action by the three Governments to frustrate a unified African opposition to the Federation. The African opposition succeeded in breaking up the Federation. After 1963 the question was whether pan-Africanism could be achieved not in dividing but uniting the people of the region.

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1. NR: Government Notice No. 18, 1959, 11th March, 1959.
 2. 1927, No. 9 Cap. 400 as amended by No. 48 of 1957.
 3. ibid. sec. 4A.
 4. Report of Inquiry into all the Circumstances which gave rise to the making of the Safeguard of Elections and Public Safety Regulations, 1959; p. 18 par. 30. Government Printer, Lusaka, 1959. (Chairman: N.C.A. Ridley).

UNIP's Pre-Independence Policy Formulation.

UNIP took over from where ZANC had left in its pan-Africanist activities. UNIP, however, appeared at a time when the pan-African movement was gathering momentum on a continental level and the theme was solidarity of all colonial peoples and the end of colonial rule and economic exploitation. The pan-African movement led to regional groupings; the major ones being the Casablanca Group (consisting of Egypt, Morocco, Ghana, Guinea, Mali and Algeria), and the Monrovia Group (composed of Cameroun, Central Africa Republic, Chad, Congo (Brazzaville), Dahomey, Ethiopia, Ivory Coast, Liberia, Malagasy, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Togo, Upper Volta, Libya and Tunisia).

Between 1960 and 1963 there were break-aways and regroupings and emergence of new groups such as the PAFMECSA covering East, Central and Southern African regions. Among the aims of these groupings were the achievement of similar not necessarily unified or identical foreign policy and concerted effort in diplomacy and national economic policies independent of control from European ownership, aid or manipulation. UNIP's policy formulation, including its 'foreign policy' when it 'become government', took place during this period when Kenneth Kaunda became chairman of PAFMECSA. The proliferation of pan-African regional groupings ended with the formation of the OAU in 1963, whose Charter provides, inter alia, as one of its aims and objects, the promotion of the unity and solidarity of the African and Malagasy States.¹

UNIP's foreign policy formulation was, therefore, influenced by the political situation in NR, the Federation and Africa as a whole. The Party's policy formulation before Independence was, however, in general terms; the Party avoided ideological or specific policies fearing that might detract or sabotage its task of achieving independence.

1. OAU: Charter, 1963, Art. 2(1)(a).

In its 'foreign policy' the Party stated that-

1. A UNIP Government will pursue a policy of non-alignment. A free Zambia will not align itself with either the West or the East.
2. Zambia shall, however, maintain friendly relations with all countries not hostile to her irrespective of their political ideologies.
3. Zambian representatives will be established in foreign countries.
4. Zambia will be a member of both the Commonwealth and the Organization of African Unity. She will also seek admission to the United Nations Organization.¹

This policy projection ignored local political, legal and economic factors and also the fact that the country's economy was tied to that of its colonial master. In the 1962 Legco General Election Manifesto the policy was slightly modified by the inclusion of the statement that "It is envisaged that the political system in this country will be based upon what is suitable for the local conditions."² It is pertinent to note that Zambia's (or UNIP's) pan-Africanist activities were to be all carried out within the ambit of the OAU. This was intended to show that UNIP did not support regional groupings opposed to the OAU aims and objects. Some of the aspects of the regional groupings had began to create some anxieties among, e.g. some of Ghana's neighbouring states about the suspected expansionist tendencies of Nkrumahism. The Ghana-Guinea union, the Ghana-Guinea-Mali union, and the Ghana-Upper Volta 'customs union', were suspected as a prelude to situations under which weak or small states might be 'taken over' by their more powerful states in the region.³ Hopefully, it was expected that future 'unions' or exercise of pan-African functions or the creation of the 'United States of Africa' would be carried out in the

1. UNIP: When UNIP become Government; 1960, p. 12.

2. UNIP Manifesto, 1962; p. 32.

3. See for instance, Elias, T.O., Government and Politics in Africa; Asia Publishing House, London, 1961, pp. 250-274.

letter and spirit of the OAU Charter, namely that the member States of the Organization declare their adherence to and observation of the principles of the sovereign equality of all African States, respect for the sovereignty and territorial integrity and for the inalienable right to independent existence of each State.¹ In considering UNIP's role in the formulation and implementation of Zambia's foreign policy it is important to bear in mind one important limitation on the Party's influence, namely that at independence in 1964 Zambia was born into a world which had already established the UNO, the North Atlantic Treaty Organization (NATO), the Warsaw Pact Treaty Organization, the OAU, the Afro-Asian Solidarity Conference, the Non-Aligned Nations, the Commonwealth and many other influential groupings. This web of international bodies and alliances is bound to deny any State a trully independent foreign policy: in reality under such circumstances the most that any State can do is to 'behave' in accordance with the rules of the game of co-existence. Only to that extent is the following statement understood, viz

Clearly Zambia's foreign policy will continue to reflect the interests of the state as well as other internal and external institutions, but the balance between President and the Party, class and copper, regional and global interaction remains problematic.²

Section 2. The Party and Foreign Policy.

Unlike the American system in which certain institutions, e.g. Congress, are charged with the responsibility of checking on how the Republic's foreign relations were conducted, in Zambia the conduct of foreign relations is not subject to scrutiny by any institution.³ Party members at the Section, Branch, Ward and District levels have no say

1. OAU: Charter, 1963, Art. 3(1) to (3).

2. Anglin, D.G. and Shaw, T.M., Zambia's Foreign Policy: Studies in Development and Dependence; Westview Replica, Boulder, 1979, p. 425.

3. UNIP: Constitution, 1988, Art. 65(3)B(g) merely provides that the Political, Ideological and Legal sub-Committee "guide the Government on foreign policies and in matters of agreements and treaties"; infra; p. 463.

in the formulation of foreign policy. The organs of the Party with some influence on policy formulation in general are the Committee of Chairmen and the Central Committee. What was said in Tanzania, vis-à-vis the role of Parliament in foreign affairs, could be said of the National Assembly in Zambia to-day: ".....regarding the recognition of other states the Government is completely independent of Parliament and owes no explanation."¹ In Zambia Parliament has no role in foreign affairs.

The Party's national aims, objectives and policies for the decade 1985-1995 adopted at the 9th Party Congress in September, 1983, cover a wide variety of subjects pertaining to the economy, culture, education, science, technology, land, defence and security. But nothing is expressly said about the foreign policy the Party would pursue during the decade. Instead, it is stated that

As long as the United National Independence Party remains the ruling Party in Zambia, there can never be any other or new UNIP programmes except suggestions to modify, amplify or re-interpret the 1962 Manifesto in order to meet the challenges of the changing circumstances inside and outside Zambia.²

The foreign policy of UNIP as adopted in 1960 and 1962 was in general terms, e.g. non-alignment. That policy has been dominated by the President and has been dented and tainted by the philosophy of Humanism adopted in 1967 which is said to recognize the importance of Man where he lived, whether he is black, white or yellow. On the basis of that policy, UNIP advocates (a) Human rights and dignity; (b) International peace and justice; (c) Non-alignment; (d) Good neighbourliness; and (e) Support for liberation movements.³ These are of course, the Party's own guidelines

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| 1. Tanzania: | 2nd Vice-President Rashid Kawawa, <u>Parliamentary Debates</u> (Hansard), 19th June, 1968, a debate on Tanzanian Government's recognition of Biafra. |
| 2. UNIP: | <u>National Policies for the Decade 1985-1995, Aims and Objectives of the Third Phase of the Party Programme</u> ; Government Printer, Lusaka, 1984, p. 56. |
| 3. | President K.D. Kaunda, Opening the 19th National Council, 9th December, 1984. |

to assist in carrying out its aims and objectives in a world dominated by more powerful states than Zambia. The Party Constitution provides that the President is the principal spokesman of the Party on national and international affairs.¹ As to the formulation of foreign policy itself, the National Council does frequently pass resolutions on any international matter, e.g. on Palastine, Namibia, apartheid in South Africa etc. Such resolutions, however, merely reflect the feeling in the Party and are not necessarily directives to the President to implement them. Decisions on foreign affairs are taken either by the Committee of Chairmen, composed of the President, the Prime Minister, the Secretary of Defence and Security and twenty other MCCs appointed by the President,² or the President alone.

The Committee of Chairmen is UNIP's 'Politburo'. The system is, however, different from that existing in the one dominant party socialist countries in which foreign affairs decisions are made by the leading organs of the Party: political control of foreign policy flows from the Central Committee; though the implementation is carried out by the government since international relations are, by their nature, relations between states.³

In Zambia the President inherited the Crown's prerogative powers, thus, at common law the President alone can decide on such matters as conclusion of treaties, recognition of states, declaration of war or peace without consulting the Party or the National Assembly or the Courts of law. Although some prerogative powers have been expressly provided for in the Constitution, e.g. the prerogative of mercy,⁴ the conduct of foreign affairs is still a prerogative of the President alone.⁵ The Party organs' roles are only of providing guidelines for the President to consider.

1. UNIP; Constitution, 1988, Art. 74.

2. ibid. Art. 62(a) to (e).

3. Loeber, D.A. (Ed.) Ruling Communist Parties and Their Status Under Law; Martinus Nijhoff Publishers, Dordrecht, 1986, p. 275.

4. Zambia: Constitution of Zambia Act, 1973, Art. 60.

5. See, e.g. Dear Mr Vorster; Details of exchanges between President Kaunda of Zambia and Prime Minister Vorster of South Africa; Government Printer, Lusaka, 23rd April, 1971

Under such a system there is no room for conflict or drawing a balance between the Party and the President. The system should be viewed in its own context; the President is head of both the Party and Government administration. In theory he has no policy of his own; policies of the Party - and subsequently of the State - are adopted by the Party Congress. In practice, however, effective 'policies' do emerge in the amplification, interpretation and application of the broadly laid down policies of the Party. This study has demonstrated that under the One-Party system it is the President around whom all political and other activities in the country take place. Foreign relations are not exception to that rule. Although the National Assembly does scrutinize, among others, the budgetary allocation for the Ministry of Foreign Affairs, it does not debate the actual conduct of Zambia's foreign relations. The Political, Ideological and Legal sub-Committee of the Committee of Chairmen has no control over Zambian missions abroad: high commissioners and ambassadors report direct to the President. In Zambia, however, the sub-Committee acts as the link between the Party and foreign ambassadors and high commissioners. The contact is limited to political matters; e.g. implementation of party-to-party agreements.

(a) UNIP and Regional Relations.

Either under a multi-party or single-party system, foreign relations are regarded as matters falling under the jurisdiction of the Government. The government, however, also means the ruling party. The Constitution of the Party provides that the Party shall guide the Government on foreign policies and in matters of agreements and treaties.¹ In practice that means that the Committee of Chairmen has to decide on all regional relationship before the Government can enter into any trading or economic co-operation agreement. The decision whether Zambia becomes a member of the SADCC is made not by the Cabinet but by the Committee of Chairmen: the decision is considered to be 'political' and

1. UNIP:

Constitution, 1988, Art. 65(3)B (f).

accordingly should be made by that Committee.

Since its emergence, UNIP identified the eradication of colonial rule from Africa in general, and, in southern Africa in particular, as one of its most urgent and important challenges. UNIP's pre-occupation in the sub-Sahara Africa has been with the liberation movements engaged in the freedom struggles: although the majority of the states in the region are now free, Namibia and South Africa are still under foreign rule. In addition to that, South Africa's violation of its neighbouring States' sovereignty through military incursions, has created an atmosphere of 'not yet free' in the 'Front Line' states, including Zambia, which has compelled the leaders of these states to combine their efforts in supporting liberation movements, on one hand, and in regional economic organization such as the PTA¹ and the SADCC² whose major aims and objects are to accelerate economic growth in order to reduce the dependence of the member-states on South Africa, on the other hand. To a great extent, therefore, UNIP's regional policy is dictated by UNIP's commitment to ending of colonial rule in the region and Zambia's geographical situation.

(b) UNIP's Continental Relations.

Although after 1963 African continental relations have been purported to be organized around the OAU, political parties have concluded a network of fraternal agreements dealing with party-to-party matters. Accordingly, UNIP has entered into agreements with, inter alia, the BCP MCP, MPLA-WP, FRELIMO, MPR, UPRONA,³ NRMD, CCM and the PCT. UNIP appears to

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| 1. Zambia: | Preferential Trade Area for Eastern and Southern African States; Lusaka Declaration of Intent signed in March, 1978, PTA established in December, 1981, comprising fifteen member States and five potential member States. |
| 2. Botswana: | launched at the Lusaka Summit, 1st April, 1980, comprising of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. |
| 3. Burundi: | Union Party for National Progress. |

hold the view that party-to-party agreements contribute towards world peace, security and understanding. Accordingly, such agreements have been concluded with political parties operating under a one-party, a multi-party or a military cum civilian system. UNIP's involvement in such agreements enables it to pre-determine the diplomatic and/or the foreign relations line the Government of Zambia should follow both in theory and in practice. Since the choice of the political organization with which UNIP should enter into fraternal agreements is made by the Central Committee of the Party,¹ it is a political decision based on that body's contemporary perceptions of the friends of Zambia or UNIP.

(c) UNIP and Global Relations.

UNIP has entered into agreements with almost all ruling communist parties of Eastern European countries, including the Communist Parties of the Soviet Union and Cuba. In the Western European countries, however, UNIP has maintained relationship with the Labour Party of the UK and the Socialist party of France; relationship which began during the struggle for Independence.

The international system and scene is not composed of just States and international organizations, but political parties as well which are not only talking politics to each other, but exchanging ideas, political cadres, educational educators, delegations, publications and providing each other's leadership with hospitality ranging from holiday to medical facilities. Political parties although not recognized by International Law, are prominent instruments in the conduct diplomacy and negotiations in the solution of many international issues. The capitalist system has tended to maintain a multi-party system which operates on a 'political party in power line', while the socialist system pursues a 'national political line' under a one-party or dominant party system. The party-to-party fraternal agreements have tended to be

1. UNIP: Constitution, 1978, Art. 54(m), now Committee of Chairmen, Constitution, 1988, Art. 63(1) (1).

concluded and easily implemented under the latter than the former system.

These agreements, notwithstanding the close identity or the 'oneness' of the Party and the Government (under a one-party system), are not treaties and any dispute or matter arising out of their negotiation, conclusion, implementation or termination, is expected to be settled through 'friendly consultation and mutual understanding', that is, not through judicial process. Under International Law only Governments and certain international organizations possess the necessary capacity and authority to enter into or conclude treaties or international agreements. In most communist countries treaties are signed by the Party leaders, acting as agents of both the ruling Communist Party and the Government.¹ UNIP's agreements are signed by the President or the Secretary-General or an MCC (often a Chairman of a sub-Committee of the Committee of Chairmen) depending on who was leading the Party delegation at the meeting which ended with the conclusion of the agreement. But these are not treaties or Government agreements binding on the Republic of Zambia; there are simply party-to-party agreements. Of late the Eastern European bloc countries' political parties entering into agreements with UNIP - and it appears with other political parties - have been insisting on the inclusion of a ratification clause in party-to-party agreements so that the agreement would enter into force only following the exchange of the instruments of ratification. That practice will elevate party agreements to the level of 'international agreements'; though not enforceable by ICJ.

The party-to-party agreements clear the way for State (Government) agreements; thus through them UNIP plays the primary role in Zambia's foreign policy. Through inter-party commissions which supervise the implementation of these agreements, the Party participates in the regular machinery of Zambia's foreign relations.

1. Loeber, D.A., op. cit., pp. 275-276.

Section 3. Liberation Movements and Fraternal Parties in Zambian Law.

The right to self-determination of the colonial peoples as recognized under the UNO Charter¹ has been enhanced by a number of Resolutions of the General Assembly passed in particular in 1960², 1970³ and 1979.⁴ These Resolutions gave legitimacy to MPLA's and FRELIMO's fighting against Portuguese colonialism in southern Africa, and SWAPO's liberation struggle against South Africa's illegal occupation and administration of South West Africa (Namibia). The right to self-determination is, therefore, a recognition of the collective rights of a national entity under the Charter of UNO and International Law. The recognition of the right to self-determination is important as it presupposes that the right will be and/or can be pursued or vindicated through the instrument of a public body such as a national liberation movement and that the struggle itself is thereby accorded a legal basis or status in international law. Zambia supported some of these UN Resolutions.

The Constitution of UNIP enjoins the Party to fight against imperialism and colonialism⁵ and to coordinate its role with that of the liberation movements.⁶ In the implementation of these provisions, the Central Committee authorized a number of liberation movements to be stationed in Zambia. Liberation movements are basically political parties waging a political struggle against a foreign rule or rulers of their country.⁷ Consequently, a question could be asked whether the presence of a

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1. UN: Charter, 1945, Arts. 1 and 55.
 2. The Declaration on the Granting of Independence to Colonial Countries and Peoples; G.A. Res. 1514(XV).
 3. G.A. Res. 2625(XXV) requiring Member States to render assistance to persons engaged in self-determination struggle.
 4. G.A. Res. 34/42 (XXXIV), which recognized that self-determination may be carried out through armed struggle.
 5. UNIP: Constitution, 1988, Art. 4(2)(m).
 6. ibid. Art. 65(3)B(c).
 7. Supra, p. 29 on the definition of a 'political party'.

number of liberation movements violates the legislation to the effect that Zambia is a One-Party State. The Constitution of Zambia provides that

4.(1) There shall be one and only one political party or organisation in Zambia, namely the United National Independence Party (in this Constitution referred to as 'the Party').

(2) Nothing contained in this Constitution shall be construed as to entitle any person lawfully to form or attempt to form any political party or organisation other than the Party or to belong to, assemble or associate with, or express opinion or to do any other thing in sympathy with, such political party or organisation.¹

There is also legislation to the effect that every society which is a political party or organization or has for its objects or purposes political activity of any kind, is an unlawful society in Zambia with the exception of the Party - UNIP.² Although the One-Party system was introduced in Zambia at the peak of the liberation struggle (1972) in Portuguese East Africa (Mozambique) and West Africa (Angola), in the British Colony of SR, in South West Africa (Namibia) and South Africa, the NCEOPPDZ did not draw its attention to the question of the status of the liberation movements under a One-Party system in Zambia. The Central Committee of UNIP which had the jurisdiction to recognize and supervise the presence of liberation movements in Zambia (now the Committee of Chairmen), at times recognized more than one of such organisations from the same country, e.g. the African National Congress and the Pan-African Congress of South Africa, ZAPU and ZANU from SR and MPLA and UNITA from Angola. In case of UNITA, the recognition was terminated when its leaders were expelled from Zambia by the UNIP's leadership.³

(a) The Status of Liberation Movements.

In order to answer the question whether the presence of the liberation movements violates Zambian legislation, some references will be made to the legislation, court decisions and recommendations of

1. Zambia: Constitution of Zambia Act, 1973, No. 27, Art. 4.

2. Societies (Amendment) Act, 1974, No. 9. sec., 22A.

3. Ignatyev, O., Secret Weapon in Africa; Progress Publications, Moscow, 1977, p. 69.

a commission of inquiry. To begin with the last, the International Commission on the Assassination of Herbert W. Chitepo,¹ killed in Zambia on the 18th March, 1975, by a parcel bomb, who at the time of his death was the National Chairman of ZANU and an enlarged African National Council of Zimbabwe, that is a liberation movement of Zimbabwe operating in Zambia, recommended that a host country to a liberation movement should respect the independence and integrity of such a movement. The host country is expected to help such an organization in maintaining discipline among its members.² The liberation movement in turn is required to respect the laws of the host country in every respect including the treatment of those engaged in political activities.³

Any organization recognized by the Committee of Chairmen as a 'liberation movement', is required to register as a 'society' under the Societies Act, under which UNIP is also registered as a 'society'. There is no decided authority on this matter; it could be speculated that the courts in Zambia confronted with the question of the status of a liberation movement's registration under the Act, would most probably hold that the registration was for administrative purposes only so as not to render the movement as an unlawful society and that such registration did not constitute such an organization as a 'political party' or 'political organization' under Art. 4 of the Constitution of Zambia, 1973 or sec. 22A of the Societies Act. Such a finding could be based on the fact that a liberation movement, though present in Zambia, was not formed for the purposes of participation in electoral process in the Zambian constitutional

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| 1. Zambia: | <u>Report of the Special International Commission on the Assassination of Herbert Wiltshire Chitepo</u> ; Government Printer, Lusaka, 1976. (Chairman: R.C. Kamanga). The Commission was composed of representatives from Botswana, the Congo, Ivory Coast, Libya, Malagasy, Morocco, Mozambique, Malawi, Sierra Leone, Somalia, Tanzania, Zaire, Zambia and the OAU; p. xiv. |
| 2. | <u>ibid.</u> p. 52, par. 282. |
| 3. | <u>ibid.</u> p. 53, par. 288. |

law system. This argument takes into account the recommendation of the Special International Commission, aforementioned, that a liberation movement should observe the laws of the country in which it has been offered refuge. Such registration is an aspect of that observance. That argument, however, as the following section will show, explains the nature of the problem. It does not solve the problem itself. There is also an inherent contradiction in the argument in that while the liberation movements and their personnel are required to observe the laws of the host country, the laws of the host country in most cases do not recognize liberation movements and/or their personnel.

The creative developments in International Law in support of the rights and interests of subject peoples fighting against colonial rule, racism or apartheid¹ have not been manifested in municipal law of countries that support liberation movements. Since liberation movements are stationed in one state or the other, one would have expected creative developments in municipal law in recognition of such organizations within their jurisdiction. The absence of such legislation is, however, understandable in that the legal status and role of political parties in general in such countries are in the main unsettled and still in the process of development. The development of laws on liberation movements is, however, hindered by the notion and practices which regard, for instance, the relation between UNIP and the liberation movements and their personnel, as 'secret', and not subject of public scrutiny or legal control. That should not be the case because the role of supporting organizations and persons engaged in the fight for self-determination has become an international duty on all progressive states of the free world. There is nothing secret about it. Legal regulation might go only to perfect that international obligation.

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Supra, p. 467.

(b) Status of Fraternal Organizations.

A fraternal party or organization is a political party on friendly terms with UNIP operating in an independent state. Often UNIP's fraternal parties are ruling parties although at times a political movement opposed to the government of an independent state has been allowed to station its officials in Zambia.¹ UNIP's fraternal relations are often forged through the party-to-party agreements considered in the previous section. Political parties do not exchange representatives to be permanently stationed in each other's country. Even a joint commission established under such an agreement often meets once in a year to review how the provisions of the agreement have been carried out. The presence of such delegations do not create any political or legal problems. The problems arise in those situations in which a fraternal party has been overthrown from office and its leaders purport to constitute and organize the party in Zambia. Although such an organization is formed by exiled political leaders who talk of 'mobilizing the people for the liberation of our country', such an organization according to Zambia's practice, is not regarded as a liberation movement; it is a fraternal party's branch allowed by the Central Committee to exist in Zambia.² Allowing a fraternal party to reconstitute itself in Zambia can lead to some political as well as legal problems. For instance, political organizations opposed to the fraternal party so recognized might also want to organize in opposition to it within the jurisdiction.

Following the overthrow of Dr Milton Apollo Obote as president of Uganda on 25th January, 1971, a number of Ugandans fled to Zambia. The UPC was a fraternal party of UNIP and Obote was a member

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1. e.g. leaders of political parties opposed to the MCP in Malawi; supra, p. 250.
 2. UNIP: now the Committee of Chairmen; Constitutions, 1988, Arts. 63(1)(d) and 65(3)B(c).

of the so-called 'Mulungushi Club' consisting of the Presidents of Tanzania, Uganda and Zambia. Members of the UPC began to organize the Uganda exiles in Zambia and holding both private and public meetings. UNIP was concerned with reports of clashes between UPC members and some Ugandans opposed to UPC who had also began to organize themselves in opposition to the UPC. The situation became complicated when the UPC and two of the opposition organizations applied to be registered under the Societies Act. The registration of such organizations would have created a serious problem under Zambia's One-Party system. It would have meant that Ugandans in Zambia could organize themselves into several political organizations while the local people are forbidden to form or belong to any other political party other than the Party, UNIP. The application was accordingly not sanctioned and the purported registration aborted. That did not stop the political organization of Ugandan parties in Zambia. The situation was saved by the overthrow of Idi Amin Dada, the Ugandan eccentric dictator on 11th April, 1979 and Obote's return to Uganda on 27th May, 1980, which made most Ugandans to leave Zambia and return home. Obote's second overthrow on 27th July, 1985 and his and his supporters fleeing to Zambia on 15th August, 1985, did not immediately revive the activities of the UPC and its opponents. The status of fraternal parties is, therefore, worse than that of liberation movements which can register under the Societies Act.

The concept of fraternal party has deep roots in African political organization. During the colonial era political parties harboured each other in each other's country.¹ In Central Africa during the decade of the Federation of Rhodesia and Nyasaland (1953-1963), settlers' political parties became 'federal' with territorial branches. Africans on the other hand, did not form federal political organizations; their organizations remained territorial, though some formed branches

1. See *supra*, on NANC branches in NR, pp. 62-63 and UNIP's representatives in Ghana (p. 114) and Tanzania (p. 116).

throughout the Federation. It is the introduction of the one-party system that has highlighted the present problem. The fate of fraternal parties existing in exile is tied up together with the right of the people of the host country to organize themselves in political parties or organizations. Thus, out of thirteen Commonwealth African countries, Lesotho and Swaziland are party-less states. Five are de jure one-party states, namely Kenya, Malawi, Sierra Leone, Tanzania and Zambia. Three, Botswana, The Gambia and Zimbabwe, are running a multi-party system. Three are under military rule.

In case of Zimbabwe, the Constitution Amendment (No. 6) Act, 1987¹ effected the removal of the reserved White Roll seats from the House of Assembly and the Senate after 21st September, 1987.² One of the immediate effects of those changes was the demise of settler political organisation. On the African scene, an agreement was entered into between the ruling ZANU-PF of President Robert Mugabe and the opposition ZAPU of Joshua Nkomo, to usher in a One-Party system in Zimbabwe in the 1990's. In Zimbabwe UNIP's historical fraternal party is ZAPU. There are difficulties for UNIP fraternizing with a party in opposition, accordingly UNIP has not concluded a fraternal agreement with either ZANU-PF or ZAPU.

As the multi-party system sinks into oblivion and its orthodox place is taken over by the one-party system, fraternal party-partnership will not necessarily recede into the background but will continue; political parties will continue fraternizing either as oppressive alliances collaborating in the suppression of their people, or, as progressive alliances promoting a democratic, albeit a one-party system, representative system of government in their respective states. Although fraternal parties refrain from meddling in each others' internal or external affairs, in practice they often expect support and encouragement from each other in whatever they do. Ideally, criticism should also be welcomed.

1. Zimbabwe: 1987, No. 15, repealing sec. 38(1)(b) of the Zimbabwe Constitution Order, 1979, S.I. 1979/1600.
 2. 1987, No. 16.

(c) The Status of Liberation Movement Personnel.

Although the decision allowing a liberation movement to be stationed in Zambia was made by the Central Committee of the Party, the responsibility for the safety and welfare of liberation movement personnel - a generic word to cover combatants, politicians, students, administrative staff and their families - is shared between and among the Party, the OAU Liberation Committee's representative in Zambia, the Government of Zambia and the liberation movement itself. At the international level the status of combatants of national liberation movements struggling against colonial and alien domination and racist regimes captured are to be treated and accorded the status of prisoners of war.¹ In order to be accorded this status, however, the liberation movement must make a unilateral declaration under Art. 96 of Protocol 1 of 1977 which is an additional protocol to the Geneva Conventions of 1949 which contain the core of the law for the protection of individuals in time of war, to observe the customary rules of war, especially in relation to the treatment of prisoners of war. SWAPO, for example, has already made a public statement that the 'Namibian Liberation Army must - and does - comply with the laws and customs of war as set out, in particular, in the Geneva Conventions of 1949, and South Africa's armed forces are also bound by these Conventions.'² The African National Congress of South Africa has also made a similar declaration.³ South Africa has not observed its obligations.

The legal status of liberation movement personnel is unsettled in Zambian law. The personnel do not enter Zambia as refugees, hence, they are not required to register as such under the local law,

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1. UN: G.A. Res. No. 3103 of 1973 and see also the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973.
 2. SWAPO: Statement made at Dakar International Conference, Namibia and Human Rights, in International and Comparative Law; 1978, p. 389.
 3. UN: General Assembly Doc. A/35/710 of 4th December, 1980.

mainly the Refugee (Control) Act, 1971,¹ and not as regular visitors, thus they do not enter or leave under circumstances regulated by the Immigration and Deportation Act, 1965.² Although there is no difference between a political refugee and a liberation movement official, the law draws a distinction. For example, under the Botswana Refugee (Recognition and Control) Act, 1967,³ there is reference to a 'political refugee', who is defined as 'an immigrant who has suffered or is likely to suffer political persecution in the country from which he has entered Botswana'.⁴ That definition would include an official of a liberation movement. The difference between a refugee and a liberation movement official lies in the fact that the latter does not enter the country of refuge as an individual, but as a component part of or under the umbrella of an organization recognized by the host country.

In Shipanga v. Attorney-General,⁵ the applicant, for the writ of habeas corpus, was Information Secretary of SWAPO who had entered Zambia in 1972. Some differences arose between him and the SWAPO leadership recognized by both the UN and UNIP as the SWAPO Liberation Movement in Zambia. The Government of Zambia fearing that the conflict might erupt into violent internal clashes and mindful of the recommendation of the Special International Commission on the Assassination of Herbert Chitepo, placed the applicant and a number of his colleagues, under an armed Zambian guard in a small camp separate from the rest of the SWAPO personnel. Under the Constitution of Zambia, 'every person in Zambia' is entitled to the fundamental rights and freedoms of the individual, and among these rights is the protection of the right to personal liberty, that is that no person shall be

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1. Zambia: 1971, No. 40, Cap. 112.
 2. 1965, No. 29, Cap. 122.
 3. Botswana: 1967, No. 8
 4. ibid. sec. 2.
 5. (1976) ZR 224.

deprived of his personal liberty save as may be authorised by law. The basic argument in this case by the Government was the contention that the phrase 'every person in Zambia' did not include a member of a liberation movement and that view prevailed in the High Court where the application was rejected. Four days before the hearing of an appeal by the Supreme Court, the applicant and his colleagues, about nine of them, were flown to a SWAPO camp in Tanzania. At the hearing of the appeal the Attorney-General submitted that the Government of Zambia regarded SWAPO liberation movement in Zambia as a Government in exile and its liberation army as a visiting force, accordingly, the jurisdiction of the Zambian courts did not extend generally to members of such a force. That argument portrayed the Party line in the matter.

The Supreme Court noted that there was no legislation in Zambia providing for the status of visiting forces similar to that existing in the UK.¹ As regards the common law, the Court felt that it was unnecessary to decide whether and if so to what extent, the common law recognised the concept of a visiting force and the special jurisdiction which such a visiting force could be subjected to under such a concept because to establish the exclusion of the jurisdiction of the Zambian courts on that ground, it would be necessary to show by evidence, a number of things, inter alia, that

- (a) the Government had accorded visiting force status to the army in question;
- (b) it had recognised the tribunals of the visiting force to deal with specific offences to the exclusion of the jurisdiction of the domestic courts;
- (c) the appellant was a member of the visiting force;
- (d) the activities alleged against the appellant constituted an offence according to the law applicable to the visiting force.

1. UK: Visiting Forces (British and Commonwealth) Act, 1933, 23 & 24 Geo. 5, c. 6; Allied Forces Act, 1940, 3 & 4 Geo. 6, c. 51; United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. 6, c. 3; and Visiting Forces Act, 1952, 5 & 6 Geo. 6/1 Eli. 2 c. 69.

The Court's approach showed how much the law had stood still while the political situation in the country moved forward. The common law requirements were not laid down for a guerrilla sort of a visiting force such as SWAPO but for a regular visiting force under sophisticated conditions. Besides that the Government had no say in the recognition of a liberation movement that being the prerogative of the Central Committee of the Party. Notwithstanding the fact that the appellant had been moved out of the jurisdiction, the Supreme Court observed that there was before Court ample evidence that the applicant's fears that if he were handed over to SWAPO top leadership, he would be brought before a tribunal on fabricated charges and executed, had at least some foundation, and, that the possibility that the appellant might be executed in circumstances in which a sentence of death would not be passed by a Zambian court or military tribunal, "gives this court jurisdiction and duty to intervene".¹ The Chief Justice dissented; stating that he had no difficulty in holding the view that the liberation army of SWAPO was in the same category as recognized as visiting force in the UK and as such the appellant could not avail himself of the jurisdiction of the Zambian domestic courts as the matter in issue related to the internal discipline in SWAPO. He stated that the Court was aware of the notorious fact that Zambia, as one of the 'front-line' states committed to the liberation of southern Africa from foreign rule, provided shelter to various liberation movements, including SWAPO: "It follows that for political expediency Zambia has allowed various armies of liberation to observe their own rules of conduct in relation to internal discipline and administration."²

1. Shipanga v. Attorney-General (1976) ZR 224, per Baron, DCJ at p. 247.

2. ibid., per Silungwe, CJ, at p. 232.

Contrary to the Chief Justice's perception of this case, the fact was that the appellant was placed under the armed guard not of SWAPO, but of the Government of Zambia. For that reason, all the old-problem of the individual versus the State, human rights and the security of the State, enjoyment of fundamental human rights and/or dictatorship or totalitarian regime, and the executive and the judiciary, all surfaced. The appellant proceeded on the assumption that human rights and fundamental freedoms contained in the Constitution of Zambia and guaranteed to Zambian citizens and to all law-abiding aliens within Zambia was the responsibility of the Government of Zambia and that the same could be extended to him. By arguing that the appellant was a member of a visiting force and that he could, therefore, not avail himself of the jurisdiction of the domestic courts, the State purported to avoid meeting that challenge: it was a matter of State security.

The Supreme Court by a majority ruled that the matter be investigated further and that in the meantime the appellant should be brought back to Zambia. On the subsequent hearing, the Court was informed that SWAPO had been approached and had declined to return the appellant to Zambia. On a further application that the Government of Zambia should approach the Government of Tanzania for the return of the appellant, the respondent objected and told the Court that it was the State's view that any suggestion that the Government of Tanzania should be approached on this matter, was not in the best interest of the liberation movement and that 'the Government could not go to the Government of Tanzania with a request to do something with which it did not agree'. UNIP as a party, was not publicly involved in the conflict which was engulfing not only the appellant, the judiciary and the executive in Zambia, but also the Government of Tanzania. Under a dictatorship courts cannot freely

question excesses of the executive or of the ruling political party. Under such a system courts are expected to uphold actions of the executive or ruling party. But a One-Party participatory democracy as practised in Zambia and Tanzania is not a dictatorship; the courts are not there to unquestionably uphold any action of the executive or the ruling political party. The real difficulty in this case was that it involved the implementation of the Party's (and its Government's) foreign policy of pan-Africanism. The pan-Africanism is a double-edged policy as it entails both internal and external obligations. The State's objection to approach the Tanzanian Government on the ground that such an exercise was not in the best interests of the liberation movement, also meant that the approach was not in the best interests of the Zambian foreign relations. The Supreme Court appeared to miss that point as it courageously maintained that the Rule of Law prevailed:-

No litigant, whether the Government or a private litigant can be heard to say - and what is more in the very proceedings in which the decision was made - that that decision is not in the best interest of the liberation struggle and that he cannot do something with which he disagrees, or that high State policies are involved which are extremely sensitive and not matters falling within the legal ambit.¹

Although the judiciary prevailed over the executive by making the executive file an affidavit deposing that the Government of Zambia had approached the Government of Tanzania for the return of the appellant to Zambia but that that request had not been acceded to, (and a document to that effect was attached to the affidavit) that did not solve the problem. The Court finally observed:-

That being the case, there is nothing further this Court can do in habeas corpus proceedings. But we must point out even if the appellant's departure was at his request, it was unfortunate for the executive to provide facilities for, or to have anything to do with the departure from Zambia whilst habeas corpus proceedings were in progress without the knowledge of his legal advisers.²

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1. Shipanga v. Attorney-General (1977) ZR 53, per Silungwe, CJ at p. 53.
 2. Shipanga v. Attorney-General (1978) ZR 71, per Silungwe, CJ at p. 72.

What was in issue in this case was the legal status of a liberation movement and its personnel once the Party had allowed them to be stationed in the country. Courts are primarily sanctioning institutions, that is, they perform their function in the context of dispute settlement. They first explore the incompatibility between the matters in dispute. What was in dispute in this case was not the detention of the appellant but the conflict between him and his SWAPO fellow compatriots the conflict was the cause and the detention was the result. The fundamental question therefore, was whether the courts could adjudicate upon the cause of the dispute which involved the internal affairs of a liberation movement. The courts would not have succeeded in re-establishing amicable personal relationship between and among the disputants or the sanctioning of the breach of any SWAPO rule or norm. On the other hand, it is one of the established rules of the Rule of Law that courts should be open to the petition of anyone. This was not an easy case. However, the court should have accepted the State's stated position on the ground that the entry and presence and exit in and out of Zambia by liberation movement personnel is not regulated by any Zambian legislation, ipso facto, the activities of such organizations should not be subject of scrutiny in the courts of law.

In Tanzania when the British army was asked to intervene in an army mutiny, the Visiting Forces Act, 1962,¹ was enacted to facilitate the British army's presence in the then Tanganyika. The Act defined a 'visiting force' as any body, contingent or detachment of the forces of a country for the time being present in Tanganyika on the invitation of the Government of Tanganyika.² That law was not intended to cover liberation movement personnel. The African liberation movement

1. Tanzania:

1962, No. 70, Cap. 494.

2.

ibid. sec. 3(1). On Liberation Movements in International Law, see: Sagay, I., "The Legal Aspects of Freedom Fighters in Africa", EALR, Vol. 6, No. 1, 1973, p. 18, and Asmal, K., "The Legal Status of National Liberation Movements (with particular reference to South Africa)", ZLJ, Vol. 15, 1983, pp. 37-59.

is a sui generis phenomenon, an end-product of colonialism in Africa. UNIP's pan-Africanism is not sanctioned by any law. That can be seen as evidence of the One-Party system's tendency to rule not through Parliament or the Cabinet but through the Party's central organs, e.g. the Committee of Chairmen; a form of a dictatorship of the Party. In reality, liberation movements' personnel are refugees escaping from oppression in their land, and, as such, their entry, presence or exit into, in or out of Zambia, can hardly be a matter of invitation: it is a matter of dire necessity; a political issue to be handled by the Party. Giving of refuge to a liberation movement is now acknowledged as follows:

20. (1) All peoples shall have right to exist. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

(2) Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

(3) All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.¹

It is essential that Zambia's ratification² of the Charter is followed by comprehensive legislation clarifying and formalizing the entry, the presence and the exit of refugees and liberation movements' personnel into, in or out of Zambia. Although soon liberation struggles shall cease with the independence of Namibia and South Africa, the problem of refugees shall continue as men, women and children flee from bloody conflicts orchestrated by political factions, ethnic magnates and foreign influences in their fight for the control of the new States, or portions of them.

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| 1. OAU: | <u>African Charter on Human and People's Rights; CAB/LEG/67/3/Rev. 4</u> , 7th-27th January, 1981, opened for signature at Banjul, The Gambia; requires 26 ratifications (Art. 63) to enter into force. |
| 2. Zambia: | Signed the Banjul Charter on 17th January, 1983, ratified it on 10th January, 1984 and deposited the Instrument of Ratification on 2nd February, 1984: "Human and People's Rights in Africa and the African Charter", <u>ICJ</u> , Report of a Conference held in Nairobi, Kenya, from 2nd to 4th December, 1985, convened by the ICJ to discuss the Charter. |

CONCLUSION.

This Chapter has examined the influence the pan-African movement in Europe had in the development of African leadership and the emergence of African national, regional and continental organizations. The colonial administrators' and settlers' resistance to the emergence of some form of African political coordination in Central Africa, was understandable since colonial governments were intolerant of any opposition on western and democratic lines because they considered it tantamount to the setting up of a rival authority. That perception was correct since the Africans were in fact organizing in order to assume governmental power from the colonial rulers and eliminate settler domination and exploitation.

As regards the role of UNIP in the formulation of policies, the Chapter has shown that according to the Constitution of the Party, policies are supposed to be formulated by the Committee of Chairmen, the Central Committee and the National Council and formally adopted by the Party Congress. The President is, prima facie, not empowered to formulate any policy. In practice, however, prerogative powers, particularly those touching on foreign relations, which were exercised by the Governor on behalf of the Crown, are to-day exercised by the President. In practice the conduct of 'foreign affairs' is Government responsibility and not the Party's business. However, bearing in mind the importance of foreign relations and their effect on domestic policies, the President should report at least to the National Assembly on the conduct of Zambian foreign policy. Although the National Assembly does debate the annual allocation of money to the Ministry of Foreign Affairs, it does not debate the pro and cons of Zambian 'foreign policy' as that is considered the prerogative of the President. Informing Parliament on how Zambian policy was being

implemented would not undermine the President's exercise of his prerogative powers; instead, it would assist the President in assessing the feeling in the nation as a whole as to whether foreign relations were being conducted in accordance with the aspirations, goals and interests of the people.

On the other hand, although the Party has at times called a seminar or conference to review such matters as the economy, Humanism and religion etc., attended by representatives from the Party, the Church, and parastatal organizations as well as the Government, it has not seen it fit to call a similar seminar or conference on Zambia's foreign policy. Once in a while representatives of public institutions, the Party and the Government should come together to examine the successes and failures, the merits and demerits of Zambia's foreign policy. Such an exercise would not undermine the 'supremacy' of the Party, instead it would assist the Party in its policy formulation role.

Zambia's support for the liberation movements has an aspect of self-interest: the total eradication of foreign rule or racist regimes in southern Africa assures Zambia of peace around its borders. The support is based on the realization that 'he who does not fight for his friends' rights, can be deprived of his own rights'. In the context of the principle that the Party is the policy-formulating body and the Government is the policy-implementing body, the control of liberation movements and personnel should be done by the Government. The Party should monitor the policy aspects of such control. The success of the African Charter on Human and People's Rights, vis-a-vis self-determination and the role of liberation movements, will depend on the steps the signatory States - including Zambia - will take in adjusting the pre-existing legal and economic norms upon which the law of the Charter will be built. In Zambia one area requiring such adjustment is that dealing with the legal status and role of liberation movements and their personnel.

CHAPTER XI.CONCLUSION : SOME OBSERVATIONS ON THE PROBLEMS AFFECTING THE ROLE
OF UNIP IN ZAMBIA AND SOME SUGGESTED SOLUTIONS.

This study has analysed, from a legal stand point, some aspects of the role of UNIP in Zambia. The main focus of the study has been institutional, more emphasis being placed on the presence or the absence of legal rules governing the role of the Party. However, some references have been made to the political role of those in the top leadership of the Party and to how Party policies are formulated and implemented. The study has established at least three factors on the role of UNIP in as far as the law of Zambia is concerned, namely that:

- (a) Zambia is governed through law and through institutions one of which is UNIP, but that there is an apparent ambiguity in the law on the legal capacity of the Party and that ambiguity has at times adversely affected the role of the Party or the interests of persons who felt injured by some acts of functionaries of the Party;
- (b) notwithstanding its ambiguous legal capacity, UNIP has utilized the law in asserting its authority in the public administration of the country at both the national and lower levels; and
- (c) although UNIP operates within the framework of its own Constitution in particular, and the Constitution of the Republic of Zambia in general, the role of the Party is shaped and dominated by the President of the Party and of the Republic.

These three major factors provide the background to the following observations on the problems affecting the role of UNIP and some suggested solutions.

(i) The Colonial Legacy.

The African leaders who formed the native welfare associations

considered in Chapter II of this study, which laid the foundation upon which the NRANC,¹ ZANC² and UNIP³ were founded, were concerned mainly with African rights, interests and welfare. Their opposition to colonial rule was not based on any sophisticated theories about the nature or the function of the State or political parties. They worked on the assumption that self-rule was better than foreign-rule. However, the system of the government inherited at Independence was a system based on four factors - party, the electorate, Parliament and Cabinet. That system of the four factors involved the reconciliation of two different and conflicting necessities. One necessity was that each of the factors should think highly of itself and its duty, and act as if everything hung on itself and upon its own decisions. That was a condition of efficiency; but it might also have led, if it was not checked, to self-sufficiency and arrogance. The other necessity was that each factor should keep in touch and harmony with the rest, acknowledging that they too have the right and duty to do their work and to be left free to do it effectively. At independence there was an electorate which felt its own importance having won the 'one-man-one-vote' struggle, a Parliament which claimed exclusive sovereignty for itself, and, a Cabinet with collective pride. But colonial rule bequeathed a legacy of ambiguity in the legal capacity of the party. That has, paradoxically, weakened the role of the electorate, of Parliament and of Cabinet in the post-independence era and incidentally facilitated the dominant role of the Party in general and of the President in particular.

(b) The Law and Status of Political Parties.

The absence of law defining the capacity of the political party, at least in the Commonwealth African countries, was a result of

1. Supra, p. 61
 2. Supra, p. 72
 3. Supra, p. 75

British political tradition: the British (unwritten) Constitution is a reflection of existing principles, a description of institutions, including political parties. Processes are considered more important than political institutions, political realities than legal principles. In NR the Societies Ordinance¹ showed that colonial administrators, although aware of British ideas of freedom of association, turned their attention from finding a suitable legal vehicle for political activity to controlling political activity by repression and restriction of political party organizers. As a consequence, the Societies Ordinance was used to achieve maximum control of political leaders and that resulted in less freedom of organization, assembly and expression. The Societies Ordinance did not give political parties any legal capacity and its enforcement did not instil in the minds of the political leaders at any early stage in their political career the notion of a competitive political system. The subsequent failure of the multi-party system in Zambia was partly traceable to the fragility and ambiguity of the political party created by the colonial legislation and practices which treated African political organization as potentially subversive. The One-Party system is, to some extent, based upon and perpetuates the notion that opposition political organization is destructive and subversive.

Colonial administration played a significant role in introducing Africans to European forms of government and to concepts such as 'State', 'Government', 'Party', 'Vote', 'Election', 'Democracy' and 'President', some of which - if not all of them - have no equivalent word in most of the African languages. Although law in every country is enacted to apply generally to all the people and institutions within its jurisdiction, the Societies Ordinance in NR was applied mainly to eliminate African opposition to colonial rule. The justification for that apparent discrimination appears to have been that, in the context of the colonial

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Supra, p. 68

situation, Africans should not have concentrated on political activities but on industrial, commercial, social and cultural ventures if they were to benefit materially from the new social order. African demands for freedom of organization, assembly and expression and the vote, were viewed as exercises in irrelevancies. African political parties that have introduced a One-Party system of government¹ have justified the banning of opposition political organizations on three major grounds, some of which are similar to the grounds colonial administrators used in proscribing African political parties fighting for self-rule; first, that of the need for national unity, second, which is a corollary to the first, that of the need for undivided national effort in economic, social and political development, and, third, that opposition parties did not operate in the best interests of the peace, order and good government of the country. The law used in proscribing opposition organizations was, in most cases, the same law (the Societies Ordinance) which colonial Governors-in-Council used in banning African political organizations.²

One of the factors for the demise of the multi-party system in some African states, was the ease with which political parties could be lawfully proscribed due to their lack of legal protection. It is, therefore, not surprising that the role of political parties or a political party can be equated to chieftainship: an institution that can be used for personal aggrandizement of political power:-

African states are faced with two alternatives; modern chieftaincy or anarchy. At this cross-road, democracy can only be built through the medium of a resuscitated and revitalised notion of chieftaincy expressing itself through the single party headed by the executive President of the Party.³

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1. Zambia: Constitution (Amendment) (No. 5) Act, 1972, No. 1, sec. 12A(1), Constitution of Zambia Act, 1973, No. 27, Art. 4 and Societies (Amendment) Act, 1974, No. 9, sec. 22A; supra, pp. 130-131.
 2. Supra, pp. 73, 125 and 131.
 3. Otuteye, S.C., "Constitutional Innovations in French West Africa - the Experiences of Guinea and the Ivory Coast", UGLR, Vol. X, 1973, pp. 33-34.

That view does not reject the political party as an instrument of government, but it postulates only one political party as the embodiment of an African chiefly rule. This study has shown that there is nothing 'chiefly' under a One-Party system and that it is not an incarnation of an African traditional rule. However, the governments of modern African states will be through a political party system dominated by a President who may purport to permanently remain in office and assume the role of a 'traditional ruler'. The fact, however, remains that he is the President of a political party; hence the importance of the status of the party. Whether under a multi-party or a one-party system, the law which only indirectly recognizes political parties as merely 'societies', is bound to be outdated and a source of political instability.

The Constitution of Zambia, 1973, provides that in Zambia there shall be one and only one political party and that Party is UNIP.¹ Similar provisions are contained in the Constitutions of other One-Party States such as Malawi, Kenya and Tanzania. Such provisions have not solved the problem of the legal status of the ruling party which remains at law a 'society'. But the problem is not confined to the One-Party regimes only, as shown by the Malaysian case of Mohd bin Othman and Others v. Mohd Yusof Jaffar, Secretary of UMNO Tangjung Division, Penang and Others² in which Harun, J., observed that the Societies Ordinance was introduced in Malaya during the colonial era as a weapon with which to eradicate secret societies. The provisions of the Societies Ordinance are retained in most formerly British-ruled African states. That legislation is no longer suitable for the regulation of a political system in a free society.

In Zambia there is a need for a clarification of the status and legal effect of the Constitution of UNIP and the role of those who implement it, that is officials of the Party. Mr Chona's³ view that a

1. Zambia: Constitution of Zambia Act, 1973, Art. 4, supra p. 134.

2. (1988) HC Civil Case No. R8-22-28 at p. 18; supra, p. 157.

3. Infra, Answer to Question No. 10, Appendix 'A'; p. 549.

political party should be governed by flexible rules because political situations are volatile and not predictable, is theoretically worthy of support, but in practice that would leave unsolved the problems discussed in this study, for instance, that of a litigant being unable to sue the Party in its name.¹

In Zambia the establishment of the One-Party system by sec. 12A of the Constitution of Zambia (Amendment) (No. 5) Act, 1972 and Art. 4 of the Constitution of Zambia Act, 1973, called for consequential changes in the general law of the country. Instead, the One-Party system was superimposed on the legal system as bequeathed at Independence which did not contain clear rules on the role of political parties. It is obvious that the introduction of a One-Party system called for an extensive law reform. The failure of the Court to reach a conclusive in the cases of Nkumbula and Kapwepwe v. Attorney-General² and Shipanga v. Attorney-General³ was to some extent as a result of the failure to formulate principles on the status and role of UNIP. Consequently, in Chipimo v. Chona, Secretary of UNIP and Attorney-General⁴ the Court simply applied English authorities without pausing to consider whether those authorities which dealt with 'clubs' applied to the role of a political party under a One-Party system. Because of the Party's close identification with the Government the Courts will have to evolve new rules for the recognition of the Party as a legal entity under a One-Party system.

Although an aggrieved person may proceed against the tortfeasor or the Party in a representative capacity, legally the non-existent status of the Party means that establishing the vicarious liability of the Party through the acts of its functionaries becomes a problem in itself. It is, therefore, not surprising that the Party is seldom taken to Court.

1. Nkumbula and Kapwepwe v. UNIP (1978) ZR 388; supra, p. 156

2. (1979) ZR 267, supra, p. 158.

3. (1978) ZR 71, supra, p. 479.

4. (1983) ZR 125, supra, p. 200.

Giving the Party a certain limited capacity might also go a long way in clarifying the role of liberation movements and fraternal parties and their personnel in Zambian law. The provisions of the Societies Act which prohibit the presence in Zambia of any 'political organization' other than UNIP, require some qualification. It is a matter of utter indifference to political leaders whether or not the political party they lead has legal capacity; the legal ambiguities enable them to use the institution of the Party without challenge. Because the well-being and security of the people of Zambia is, so to speak, in the hands of the Party, it is quite legitimate to be concerned with the legal status of UNIP and to require that the legal status of such a vital institution should not be in doubt or a matter of speculation: it ought to be precisely spelt out.

The present 'confusion' is, among other things, caused by the fact that while on one hand, the Constitution of UNIP produces some 'legal effects', for instance, no person qualifies as a candidate for the office of President of Zambia or a member of the National Assembly unless he meets certain requirements as to membership of and approval by the Party, on the other hand, the Courts refuse to enforce Party rules.¹ It could be argued from the fact that the Constitution of Zambia provides for only one political party and that that Party should be organized in accordance with its own Constitution,² that the Constitution of the Party is indirectly incorporated into the Constitutional system of Zambia. The Courts have, however, adopted a legal positivist view that the Constitution of the Party is not 'law' because it has not been enacted by Parliament. Under a One-Party Constitution the Constitution of the ruling Party should be considered as a source of the Constitutional law of the land.

1. Luywa v. Sianga (1983) HP/EP. 3 (unreported); supra. p. 305.

2. Constitution of Zambia Act, 1973, Art. 4(3), as amended by the Constitution of Zambia (Amendment) Act, 1975, No. 22.

What is needed in most African states is a new definition of the political party backed by legislation that will give it some form of recognition, capacity and precise role. A face-lift is necessary to replace that which portrays a political party as a club, society, members' association on one hand, or as corrupt or subversive secret organization on the other hand. To begin with, transitional provision could be made giving a political party such as UNIP legal capacity similar to that given to the Commonwealth Secretariat under UK legislation, which is restricted to rights or liabilities in tort and contract.¹ Eventually, law should provide for the separation of the organization from its organizers so that any allegation of corruption, abuse of office or repressiveness perpetrated by those in the leadership, should attach mainly to the persons concerned, for which they should be removed from office and/or punished. In most of the developing countries political organizations are serious national institutions that justify the enactment of such a stringent legal regime.

(c) Law and the Internal Organization of UNIP.

The fact that the Party has been able to convene its Congress every five years, and its National Council annually since Independence, is evidence of the Party's continuity and stability. The way UNIP works depends on innumerable, and sometimes unidentifiable historical and environmental factors. President Kaunda's leadership is one single factor that has contributed to national unity and UNIP's entrenchment. So much

1. UK:

The Commonwealth Secretariat Act, 1966, c. 10, provides as follows:

1. The Commonwealth Secretariat, its privileges and immunities.

(1) The Commonwealth Secretariat shall have the capacity of a body corporate.

(2) The Commonwealth Secretariat shall have the privileges and immunities conferred by Part I of the Schedule to this Act.

Part I of the Schedule states that the Commonwealth Secretariat can be sued for damages in tort or on a written contract entered into on its behalf.

confidence has been placed in President Kaunda's leadership that members of the public in general and of the Party in particular, have lost sight of prima facie undemocratic manner the Party leadership has been chosen - and at times dismissed. Soon after the adoption of the One-Party system President Kaunda's view of the new system of government was that -

The United National Independence Party is supreme over all institutions in our land. Its supremacy must not be theoretical nor is it enough merely to reduce it to a constitutional provision. More than before, our task is to translate Party supremacy into something much more meaningful in the life of the nation. A great deal of progress has been made in bringing the Republican Constitution into line with our new political system.¹

The last sentence in this quotation is of both political and legal importance and interest. It portrays the State Constitution as merely reflecting a new political system established by and under the Constitution of the Party and not vice versa. The formal structures and procedures concerned with the internal organization of UNIP considered in Chapter IV correspond to the provisions of the Constitution of the Party. However, the role of the President in the selection and election of himself and MCCs is much more the deciding factor than the Constitution of the Party. That formal structures and procedures in political organizations might not correspond to reality is plain. However, the undemocratic selection of MCCs and their formal endorsement at the Party Congress is not a matter of discrepancy but a deliberate divergence caused by the dominant role of the President.

The procedures followed at the Party Congress or the National Council are based on the provisions of the Party Constitution; prima facie, the election of the President and MCCs is 'constitutional': the elections are undemocratic in that opposition to or contest against the Presidential Candidate or Presidential nominees, is systemically suppressed.²

1. UNIP: The 'Watershed' Speech, 30th June-3rd July, 1975,
p. 3, President Kaunda opening the 6th National Council.

2. Supra, p. 158

Although the Constitutions of the Party and of the Republic have been amended to reflect the concept of the 'supremacy' of the Party,¹ the internal organization of the Party is devoid of any discernible ideological basis, hence the election of MCCs is not based on any principle other than the identifiable policy of geographical representation, that all parts of Zambia should be represented in the Central Committee. There are ample provisions in the Constitution of the Party for a democratically chosen President of the Party² and MCCs.³ The implementation of these provisions is frustrated by the dominant role of the President, who effectively institutes his own re-election and appoints members of the Central Committee. What is needed to democratize the internal organization of UNIP's national organs, is not more rules and procedures but a change of attitude towards the holding of public office: political leaders should accept challenge and with challenge accept victory or defeat.

The preparation of the Constitution of the Party does not escape the close scrutiny of those in power who have to ensure that its provisions conform with their wishes. The Party's Constitution, therefore, embodies political and ideological ideas of those in the leadership of the Party as well as rules safeguarding their positions. Any reform is bound to strengthen the ideals and positions of those already in the entrenched leadership of the Party. The 1988 enlargement of UNIP's Central Committee bears out that testimony; a huge body constituted by the President to assist him run the country. But progressive reforms ought to be carried out otherwise any attempt to maintain the status quo might benefit not the Party but those who would like to see the internal organization of the Party continue to be undemocratic and the powers of the President remain unchallenged.

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| 1. Zambia: | Constitution of Zambia Act 1973, Art. 47C(2) as amended by the Constitution (Amendment) Act, 1975, No. 22 and Arts. 7 and 8, Constitution of UNIP, 1988. |
| 2. UNIP: | Constitution, 1988, Art. 73(2). |
| 3. | <u>ibid.</u> Art. 60(2). |

A political party such as UNIP, though imperfectly recognized by the law, operates among people who believe in law and a society with laws. Those who supported the introduction of the One-Party system with its corollary of the 'supremacy' of the Party would probably not have supported the scheme if they realized that it meant the 'supremacy' of the President, or that it was a mere political gimmick:

The fashion of the one party is becoming a popular political gimmick. But the one party state idea is foreign to African tradition. It is only an attempt by politicians to refuse to face realities of their countries by having open competition. It has been argued that in the African society there is no existence of a permanent opposition as part of traditional government. Therefore, an opposition party is an anomaly and a foreign imposition. This is a false doctrine.¹

The opposition party, the one-party or the competitive party systems are all foreign institutions to Africa. They have no relevance to any African traditional system of government. They are governed by statute law or the common law; in case of Zambia, both based on English law ideas. The analogy to African traditional system of government or the 'traditionalization' of the One-Party system, was intended to provide that system with a local African cultural basis mainly to equate the permanent political party leadership to the unchanging chieftaincy.² The question whether UNIP is or is not democratically constituted, for example, cannot be answered by any reference to any Zambian traditional rule or rules, but to the provisions of the Constitution of the Party or to European ideas of 'democracy' or political party system. Chapter IV has shown that the President has skilfully used the provisions of the Party Constitution to the extent that practically all holders of Party and Government offices at the national level are his nominees; to that extent it could be said that the supremacy of the Party has become the supremacy of the President.

1. Kesse-Adu, K., The Politics of Political Detention; Ghana Publishing Corporation, Accra, 1971, p. 29.

2. See for e.g. Armah, K., Africa's Golden Road, Heinemann, London, 1965, p. 72

(d) Judicial Review and Administrative Control of Party Activities.

UNIP in general and the Party Congress and the Central Committee (now the Committee of Chairmen) in particular, have been recognized by the Constitution of Zambia e.g. by assigning to them the duty to elect, every five years, the President of the Party, who becomes the sole Presidential Candidate for the election of the President of the Republic,¹ and to adopt candidates for election to the National Assembly.² These constitutional functions have to be performed; failure to do so should result in judicial review of the failure itself or the manner in which they were purported to be performed. The law has not expressly provided that the Party's or its officials' activities are subject to judicial review or administrative controls. The Party's pre-emptive move, by securing legislation to the effect that the functions of the Committee of Chairmen in the adoption of National Assembly candidates shall not be subject to judicial review,³ has enabled the Party to prevent a large number of people from standing in Parliamentary election. It is feasible that if the vetting of National Assembly candidates had remained open to judicial review, fewer candidates would have had their candidature disapproved.

It is pertinent to point out that vetting of Parliamentary candidates by political parties is carried out in one form or another in most electoral systems and what the law expressly provides for in Zambia is done elsewhere as a matter of convention. The principle is acceptable, except that at times it has been abused, for instance, where capable persons known to be critics of the Party have been barred from standing in Parliamentary elections. Judicial review of the role of the Committee of Chairmen would, however, be intolerable because vetting involves some

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| 1. Zambia: | Constitution of Zambia Act, 1973, Art. 38(3). |
| 2. | <u>ibid.</u> Arts. 67 and 75; <u>supra</u> , p. 289. |
| 3. | Electoral (Amendment) Act, 1983, No. 2, sec. 5; <u>supra</u> , p. 289. |

political considerations of who should be encouraged to participate in the national leadership. Such considerations which are based on the opinions of those already in the leadership, are not suitable for judicial verification. That is not to endorse the 'supremacy' of the Party but to acknowledge the fact that there are certain matters which should be left out of judicial review as the sole prerogative of the Party. The functions of the Party's Committee of Chairmen are similar to those of the Cabinet of the Government and such functions are not normally subject to judicial review.

UNIP could have been instituted and operated under the direct authority of a statute law, since it operates wholly in the public domain. Its jurisdiction extends throughout Zambia. Its membership is open to all Zambians although, as Chapter VIII has shown, only a minority are members of the Party. UNIP is, therefore, a public institution whose activities should be open to judicial scrutiny. However, as long as the Party remains a 'society' under the law, any judicial review of its activities would continue to be a matter of debate, doubt and speculation and a potential source of conflict between the Party and the judiciary, as the following observation shows:

With greatest respect therefore, it would appear to me that the United National Independence Party cannot be strictly equated with a members' club, granted that it is not incorporated. Meaning no disrespect, I have not come across a members' club which forms a government of a sovereign republic.¹

UNIP is more than a members' club. In the absence of any statute law expressly forbidding judicial review of the activities of the Party, persons alleging that their rights or interests have been infringed or threatened by activities of the Party, should be free to seek some redress from the Courts of law. Judicial review is a deterrence against abuse of power. The judicial review of the 1978 UNIP's Eighth General Conference² resulted in meticulous consideration and adoption of some amendments to the Party's

1. Nkumbula and Kapwepwe v. UNIP (1978) ZR 388, per Sakala, J., at p. 391.

2. Nkumbula and Kapwepwe v. Attorney-General (1979) ZR 267; supra, p. 158.

Constitution and the election of the President and MCCs at the 9th General Conference held in 1983. The Party, like any person or institution would not obviously relish its activities being the subject of judicial review.

Although in theory the Party Congress, the National Council and the Central Committee can debate and pass a vote of confidence or no confidence in the President, in practice, by the nature of things, the fall of the President would mean the fall of the entire political leadership. The fear of the total collapse of the leadership guarantees continued support for the President from his fellow-leaders: a sort of self-imposed domination of the Party leadership by the President. That to some extent makes it very difficult to impose administrative controls on the Party. There is, therefore, a need for an Ombudsman who can effectively intervene in matters involving UNIP and its members and members of the public, and, where appropriate, who can impose controls or sanctions without reference to the Executive. There is also a need for a detailed reporting to the National Assembly as well as to the Party by the Investigator-General. He should not, for example, merely give the number of complaints he declined to investigate, but also indicate the nature of the complaint, the complainant and the official or institution complained against. Such a synopsis would help in assessing the extent to which public officers, including those in the leadership of the Party, were investigated or shielded from investigation. At the moment investigations of abuse of office or authority by those in the leadership of the Party appears negligible. There should be incidents of maladministration in the Party.

The grant of damages, certiorari, injunction or declaration or the imposition of administrative controls through the Leadership Code will continue to be ineffective vis-a-vis those in the leadership of the Party or the Party itself - through a representative process - as long as the legal capacity of the Party remains unsettled.

(e) The Party, Parliament and Participatory Democracy.

Of all the organs of State, the National Assembly is the only one which bears the physical marks of the One-Party system in Zambia: all the members of Parliament belonging to the same political party. The National Assembly elections held after the establishment of the One-Party system, in 1973, 1978, 1983 and 1988, showed that the One-Party system has not dampened the interest of the Zambians in politics, which they acquired and demonstrated during the fight for one-man-one-vote and for African representation in the Legco discussed in Chapter II.¹ During the multi-party system, political parties chose both the candidate and the constituency in which he stood. There was, therefore, a form of 'vetting' of Parliamentary candidates. The provisions under the One-Party system that the Committee of Chairmen approves the candidature of prospective Parliamentary candidates,² simply put into black and white what UNIP and other political parties did as a matter of course during the multi-party days. The criticism of the vetting system under the One-Party system arises from the fact that it has been used as a weapon against, among others, popular and capable persons who have in private or in public, including the National Assembly itself, criticised Party policies or those in the leadership of the Party.

Since the grounds for having one's candidature disapproved are numerous, stretching from being considered inimical to the interests of the State to the candidate being a drunkard,³ it would be desirable that disapproved candidates were formally informed of the precise grounds for the Committee of Chairmen's disapproval. It is possible for a person to be falsely accused of being a smuggler, a poacher, a drunkard or that he engages in commercial activities contrary to the Leadership Code, or in drug trafficking or consistently committed offences against the Party

1. Supra, p. 34, in particular pp. 58 - 82.

2. Zambia: Constitution of Zambia Act, 1973, Art. 75(5); supra, p. 286
 3. UNIP: Constitution, 1988, Art. 85(2)(a) to (i); supra, p. 289.

as prescribed in its Constitution. These are serious allegations to be made against any person; consequently a person whose candidature for the National Assembly has been disapproved by the Committee of Chairmen is bound to live in anxiety as to the particular allegations made against him. The anxiety develops into fear when the vetted person realizes that the allegations are in fact made by the Party officials and members of the intelligence branch of government. In view of the prohibition of judicial review of the vetting exercise, a person whose candidature has been disapproved should be informed of the reasons to enable him ease his apprehensions and fears.

The abolition of primary elections in 1983 has enabled more candidates to stand in each Parliamentary constituency. In this regard, UNIP is pursuing the policy of wider participation in National Assembly elections. Notwithstanding the vetting powers of the Committee of Chairmen, the Party's rule of non-interference on whom the electors chose, should be maintained as it allows the voters to freely chose their representatives. The fact, however, remains that in certain constituencies the Party denies the electorate a representative 'of their choice' through the vetting system. That occurs where the Committee of Chairmen vetted a popular former Member of Parliament for being critical of the Party.

The political power of Parliament lies in its close ties or identification with the Party, while its legal supremacy lies in its exclusive power to enact the laws of Zambia which cannot be ignored by any authority, person or the Party. Law, after all, is nothing but the legal formulation of the agreed policies of the ruling political party. The provisions of the Constitution of the Party to the effect that no Act of Parliament, among other rules, shall be contrary to or inconsistent with, the Constitution of UNIP,¹ is an unnecessary restraint on the role of

1. UNIP:

Constitution, 1988, Art. 8, supra, p.322.

the representative body of the Zambian people.

Although the Constitution of Zambia does not contain provisions to the effect that the Constitution is the supreme law of the land, it is in fact the fundamental law of Zambia and all legal authority in Zambia derives from it. The Constitution provides that legislative power in Zambia shall reside in the Parliament of Zambia and shall be exercised by bills passed by the National Assembly and assented to by the President.¹ Practically all the bills passed by the National Assembly originated in Government ministries and departments and the chances of the National Assembly deliberately passing a bill, which is assented to by the President, that is against Party policy, are slim. It is, however, possible that a Private Member's bill could be passed by the National Assembly with the support of the backbenchers who are in the majority. It is feasible that such a bill could be contrary to, or inconsistent with, the Constitution of the Party. The President could refuse to assent to such a bill which was contrary to the Constitution or the policy of the Party.

If the President were to withhold his assent to such a bill, the bill would be returned to the National Assembly; the National Assembly could within six months of the bill being so returned, resolve upon a motion supported by the votes of not less than two-thirds of all the members of the National Assembly, that the bill should be presented for assent. Where a bill is again presented to the President for assent he shall assent to the bill within twentyone days of its presentation, unless he sooner dissolves Parliament.² If the President assented to such a bill, it would become law and the provisions of Art. 8 of the Constitution of UNIP would not over-ride it.

In view of the manner in which legislation is formulated, drafted and enacted, it is obvious that Art. 8 of the Constitution of the

1. Zambia: Constitution of Zambia Act, 1973, Art. 79(1).
 2. ibid. Art. 79(6).

Party is intended, in practice, as a deterrence to backbenchers' attempts at proposing bills which were contrary to Party policies. The vetting of a rather large number of prospective candidates for the election to the National Assembly in the 1988 General Election revealed that there was wide-spread criticism of, and opposition to, some Party policies and leaders. Such criticism and opposition would probably be manifested in some backbenchers proposing measures not in line with Party policies. The blunt declaration that 'no Act of Parliament' etc., shall be in conflict with the Constitution of the Party, although of doubtful legal effect, if any, serves to give the One-Party system, a bad image. On the face of it, that provision contradicts the Party's claim that the National Assembly is a committee of the National Council charged with the responsibility of concerting Party policies into law. The provision foresees conflict between the Party and the National Council, with the latter claiming independence of the former. A democratically constituted and run National Assembly is to the benefit of both Zambia and UNIP and any attempt to make Parliament subordinate to the Party might make a mockery of the Parliamentary system. Already there are indications, e.g. through the vetting system, that the independent-minded MP has become an endangered specie: schematically poached from political involvement and leadership.

At the root of this problem is the status of the Party which has led it to resort to all sorts of devices to assert its presence and authority in the administration of the country. The presence of the Secretary-General in the Cabinet and the Secretary of Defence and Security in the Government, considered in Chapter V,¹ are some of the devices resorted to in the implementation of the concept of the supremacy of the Party. But the real problem is that the bulk of the law of Zambia does not mention the Party. The backbenchers can pass legislation that can change the status of or abolish the sole role of UNIP. The Registrar of Societies, can, as a matter

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Supra, pp. 186, 199 and 205.

law, in his discretion, cancel at any time the registration of any of UNIP's Branches or of UNIP's headquarters (thereby declaring UNIP as a whole an unlawful society) if he was satisfied that it were expedient so to do on the ground, e.g., that any provision of the Constitution or a Rule of such a society was, in his opinion in any respect repugnant to or inconsistent with the provisions of any law for the time being in force in Zambia.¹ That lack of recognition and protection by the general law of the land also contributes towards the Party's determination to assert its authority over the Government. The provisions of Art. 8 of the Constitution of the Party purports to 'vest' the Zambian supreme authority - the grundnorm - in the Party Constitution. The supreme authority, however, is the Republican Constitution under which the One-Party system is established and UNIP operates.

(f) The Integration of the Party and Local Authorities.

Under a multi-party system some people support the ruling party in the belief that such support will bring patronage, resources and development to their areas. Although members of the ANC retained solid support for the opposition party in their traditional area, the Southern Province,² the tendency has been, for the majority of the people to identify with the victorious governing party; again with the hope that such identification might bring patronage and resources to them.

The establishment of the only one administrative structure at the district level in both the urban and the rural areas in Zambia, examined in Chapter VIII,³ has simplified the local authority system in the country. The people who supported the integrated local administration system hoped that the system would bring patronage and some resource allocation to their areas. The equal status of District Councils has not brought with it equal

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| 1. Zambia: | The Societies Act, Cap. 105, sec. 13(2)(a); see <u>Kausa v. The Registrar of Societies</u> (1977) ZR 195; <u>supra</u> , p. 235. |
| 2. | <u>Supra</u> , p. 348. |
| 3. | <u>Supra</u> , p. 340. |

patronage or resource allocation.

The Party perceived decentralization as a means of achieving and consolidating Zambia's Humanist socio-economic and political policies in particular of non-economic exploitation and participatory democracy. In other words, decentralization for its own sake was of little use or consequence unless the objective of bringing all forms of power to the people was achieved. Decentralization was perceived as a tool to achieve participatory democracy. Participatory democracy in turn, was not perceived as an idea of involving the people in their local affairs, but it also included the idea of the people initiating, controlling and themselves taking a large part in their own social and economic betterment. By its origin and historical development, UNIP had always been the mobilizing force linking the grassroots level of the village dweller with Government organizations at all levels. While the Party leadership might claim that the present local administration system has vested power in the people, the reality is that power has become the preserve of UNIP and the present system is a means of confirming and extending that power base.

The Local Administration Act, 1980 has succeeded in establishing a District Council which is capable of being an effective instrument of communication between the District and the Government hierarchies or between the Council and the Party hierarchies, for instance, between the Council and the Minister for Decentralization or Provincial MCC, respectively. The Act has, however, failed to provide a structure through which local people can influence local decisions due to lack of elected representation on the District Councils. The Act has also failed to provide a machinery with which to check, balance and direct the Civil Service, parastatal and other organizations operating in the District so that their activities

and operations are together canalized towards one objective.

The circumstances under which the local administration system was established in Zambia were that the Party is supreme, as the highest policy-making body in the land. Consequently, whatever institutions exist in the Districts should operate as structural extensions of the Party and therefore bound to carry out Party policies in their respective operations. In an attempt to make District Councils structural extensions of the Party, two major defects have emerged in the local administration system. The first concerns the composition of the District Councils: composed of councillors the majority of whom are not elected but appointed to the District Council. The election of the Ward Chairman, which is restricted to Party members only, does not meet the claim that the system vested power in the people. 'Power to the people' should include the concept of participatory democracy, namely that all qualified voters, registered for the purposes of election of members of the National Assembly, living in the ward, should participate in the election of the majority of the members of the District Council, including its Chairman.

The heavy presence of Presidential appointees in the National Council, the Central Committee or the District Councils might destroy political spirit, dynamism and activities among the Zambian people. Notwithstanding the attainment of Independence and the establishment of a One-Party system, both apparently launched on a participatory democracy pad, the politicization of the population should continue if that participatory democracy is to be achieved and the liberty, rights and interests of the citizens are to be maintained and safeguarded. The District Council, with its grassroots basis, should be the appropriate forum in which to learn and practice participatory democracy. That calls for District Councils whose members - at least the majority - are

elected by the local inhabitants.

The second 'defect' is that of the role of the DG, the Chairman of the District Council. The success or failure of the present system of local administration will, to great extent, depend on whether this public officer, the Party's most active local functionary, provides a viable link between the centre and the district. The DG is primarily the Presidential representative at the district level. The political role of the DG was more important during the multi-party system as the 'eyes and ears' of UNIP than under the One-Party system. Under the multi-party system the DG reported on the state of local politics, manipulated politics on behalf and in the name of UNIP. Under the One-Party system and under the Local Administration Act, 1980, the DG has open-ended functions that are essentially political but not necessarily partisan. His general responsibility for the administration of his area matches the responsibility undefinable in advance, of the Party: there are many problems he must solve by his personal authority rather than on the basis of legal powers. There is, therefore, a need for improvement in the calibre of DGs. As representatives of the President and hierarchic superiors of all specialist chief officers, the DGs are more than co-ordinators primus inter pares Government or Party officials in the district: they are national leaders performing national duties.

The Local Administration Act provides the framework within which the DG asserts his authority in the name of the President. As such he is more responsive to the President than to the people in his district. He is not accountable to any electorate or the District Council, except to the President. That introduces or extends the dominant role of the President into local administration. A chairman of the District Council elected by the inhabitants would be more responsive to the local people than a DG who is in the district to represent the President.

The role of the Party in the maintenance of law and order at the grassroots level should be viewed in its true perspective. The Local Administration Act, although it makes reference to the ward chairman, has left the administration below the District level untouched. The consequence has been that local Party officials are left to determine how the day-to-day life of the Zambian people should be managed. Each rural and urban area has its own peculiar social, economic and political problems and characteristics that defy a blanket national prescription but which are best left to be handled by the local leaders. In certain parts of the country some villages are nothing but homesteads of few scattered families, while in other areas villages are expansive settlements. In urban areas there are a mixture of shanty and squatter compounds, medium, low and high-cost areas. The maintenance of law and order particularly in the shanty and squatter compounds cannot be left to the formal police alone. Under a multi-party system it would be quite difficult for several political parties to take it upon themselves to maintain law and order in the community. Under a One-Party system, the ruling Party assumes a 'national' role and it is in that context that UNIP officials perform administrative and quasi-judicial roles. The problem in this regard is not whether UNIP should maintain law and order, but whether a 'political party' should perform such functions. In that context the problem is tied up with the legal status of the Party.

In the meantime, pending clarification of the legal status of the ruling Party under a One-Party system in particular and political parties in general, it is proper that a political party such as UNIP, operating under a One-Party system and under circumstances in which the police cannot effectively police all areas, should assume the role of maintaining law and order. UNIP is a public institution and that would be performing a public function.

(g) The Party and the Labour Movement.

The fundamental principle and objective of UNIP are that the Party is the supreme organization and guiding political force in the land. It was obvious that the prohibition of competitive political association brought about by the One-Party system was likely to adversely affect the formation and role of other groups such as trade unions, which, though non-political, would come under the constant surveillance out of suspicion that they might develop along political lines. The attempts by those in the leadership of UNIP to ensure that no activity of any national or local significance can take place in Zambia outside the auspices of UNIP, do not come as a surprise. The accusation that certain leaders of the labour movement are against socialist policies of the Party, is obvious indication of the labour movements' rejection to conform to the all-embracing role of the Party. At the same time the labour movements' protest at the Party's interference in labour matters reveals the Party's attempts to ensure that the labour movement does not develop along certain political lines unacceptable to the Party.¹

The ZCTU's insistence at engaging in political confrontations with UNIP is, however, futile and probably more harmful to the labour movement itself than to UNIP. There is no doubt that trade unions are often freer under the capitalist and multi-party system than under a 'socialist' and one-party system. In Zambia the role of the trade unions is laid down and regulated by the Industrial Relations Act, 1971,² which does not assign the Party any role in labour matters. The Party, however, operates on the principle stated earlier that it is the supreme institution in the land and can interfere in the activities of subordinate organizations

1. Chiluba v. Attorney-General (1981) ZR HN/713 (unreported) Exhibit 'FJTC 1', p. 29, being the 'Address to the Nation by President Kaunda on Monday, 27th June, 1981; supra, p. 420.

2. Zambia: 1971, No. 36, Cap. 508.

including trade unions. It is, however, 'illogical' for the ZCTU to take it upon itself the task of challenging the establishment or the continuance of the One-Party system in Zambia. The ZCTU's resistance to its designation as a mass organization of UNIP, has resulted in the deletion from the Constitution of the Party of the provision which had stated that there shall be workers' organizations affiliated to the ZCTU¹ and the insertion of the provision that there shall be workers' organizations affiliated to the Party.² One of the immediate consequences of this change shall be that individual trade unions will be persuaded - if not required - to affiliate to the Party. That will, in theory, divide the labour movement in that some trade unions might refuse to be affiliated to the Party. In practice, it is very unlikely that any trade union would vote against being affiliated to the Party. Consequently, as more or all trade unions affiliate to the Party, the ZCTU would stand isolated; that might signal the beginning of its demise. That would be a tragic loss to Zambia's labour movement because the ZCTU has an important role to play as the cog in the trade union wheel.

A good working relationship between the Party and the ZCTU is essential not necessarily for the same reason advanced by political leaders, the supremacy of the Party, but for the sake of the economic prosperity of the country and industrial peace and stability. Zambia's economic prosperity is dependent on copper for labour utilization and the earning of foreign currency. The Party, the Government and parastatal organizations with their ever-increasing, relatively well-paid urban labour force, are dependent on peaceful industrial relations in the copper-mining industries in particular and the other economic sectors in general. The labour movement covers all the major sectors of the economy.³ Accordingly, a labour movement that toes the

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1. UNIP: Constitution, 1978, Art. 59(2) and (3); supra, p. 417.
 2. Constitution, 1988, Art. 81(2).
 3. Supra, p. 413, TABLE G showing the major trade unions in Zambia.

Party line is, therefore, essential to the Party.

A labour movement's exclusive control of worker-power is subject to the political party's exclusive control of political power. Under a One-Party system, a labour movement, in order safely to protect the interests of the workers, should adopt a less defiant opposition to the ruling party. That does not mean that it should not criticize those party measures it considers contrary to the interests of the workers, but it should aim at influencing Party decisions rather than confrontation.. Confrontation with the ruling party might result in party-inspired conflicts in the labour movement, intended to effect a change in leadership in the labour movement so that leadership went to those inclined to work in harmony with the party. The loser in such a situation would be the labour movement. The appointment to the Central Committee of UNIP of the Chairman of the powerful ZMU, Timothy Walamba and the the Deputy General Secretary of the ZCTU, John Sichone, at the 10th Party Congress held in August, 1988, clearly shows that the UNIP leadership purports to isolate some of the ZCTU militant leaders such as Fredrick Chiluba and Newstead Zimba, the ZCTU Chairman-General and General Secretary, respectively, from the Party on one hand and the trade unions, on the other hand.¹ This development shows that the Party has failed to resolve the conflict existing between UNIP and the ZCTU over the designation of the latter. In the final analysis the loser will be the ZCTU: the Party might either change its entire leadership or abolish it altogether.

Law is an instrument of social change. In Zambia the courts will have to face the challenge and decide on matters that are steeped in political controversies. The real world of the judge to-day is full of quasi-political issues. The judicial attitude in the detention cases brought before the courts by the trade unions leaders in 1981² revealed

1. Supra, p. 428

2. Supra, p. 422 et seq.

that a dispute between the Party and trade unions could not be solved through the courts of law. There is, therefore, a need for legislation to clarify the role of the Party in labour relations. Such legislation would also clarify the role of the Party Committee at the Place of Work.¹ One advantage of such clarification would be that it would provide a framework within which the Party, the labour movement and the judiciary, would exercise their respective roles. The recent developments in the relationship between the Party and the labour movement in which trade unions are required to affiliate to the Party,² and the apparent isolation of the ZCTU might not solve the problem of the relationship between these organizations: these are temporary devices to suit the present leadership in the Party and the ZCTU. Long term solutions are required, hence the proposals that legislation should be enacted to clarify the role of UNIP in labour matters.

Whether in a multi-party or a single-party system, the ruling party cannot run the State alone.³ Other 'national' organizations such as trade unions play a vital role in the economic affairs of the country. In Zambia UNIP cannot hope to run the affairs of Zambia alone without the support of the labour movement. The labour movement, on the other hand, cannot hope to function effectively without the support of UNIP. It is, therefore, essential that the leadership of these otherwise complementary organizations learnt to work together and build a democratic culture and peaceful co-existence between them. Without a spirit of mutual goodwill and understanding, laws alone will not create a cordial relationship between UNIP and the ZCTU in particular and other trade unions in general. In the final analysis the labour leadership will have to accept the leading role of the Party leadership: political leadership is a prerogative of the Party.

1. Supra, p. 432.

2. UNIP: Constitution, 1988, Art. 81(2).

3. Schapiro, L., "Can the Party Alone Run a One-Party State?", in his Political Opposition in One-Party States; Macmillan, 1972, pp. 15-22.

(h) The Party and Foreign Policy.

The study of institutions - such as this one on the legal aspects of the role of UNIP in Zambia - can give rise to theories about how they should operate and their relationship with other institutions. The colonial situation in which UNIP emerged, was not circumscribed by detailed laws on the role of public institutions, let alone political parties, perhaps because the rational British mind did not like to define things clearly, preferring to leave institutions and their procedures to the discretion of the administrators. Law was restricted to the general principles embodied in legislation and rules developed by the courts. It was in the main limited to litigation and regarded as something of special interest to lawyers. Law was not considered as an aspect of the relationship between the Imperial Power and its dependency or between or among the dependencies themselves. The Imperial Power's conduct of 'colonial affairs' was one area which was not subject to legal control.

Throughout this study the dominant role of the President has featured in practically all aspects of the role of UNIP. The President's dominant role has of course permeated the formulation and implementation of Zambia's foreign policy. Two major factors have contributed towards the President's control of foreign policy. First, the fight against colonial rule in general and the Federation of Rhodesia and Nyasaland¹ in particular between 1953 and 1963, introduced an element of urgency in the struggle for self-determination. There was during that period no room to question the methods those in the leadership of nationalist movements adopted in presenting African demands to colonial rulers. The dominant role of the President was, therefore, shaped by internal as well as external

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Supra, p. 70.

factors. Internally, the masses were united behind their leaders, convinced that whatever their leaders said or did were to their (the masses') interest. Externally, the leaders were given a 'free-hand' in the manner they demanded 'freedom now' from the colonial masters. After Independence the role of the President, though regulated by the provisions of the Constitutions of the Republic and of the Party, the 'free-hand' has continued with regard to foreign policy. The lack of an effective mechanism for imposing control or influence over the President's role in foreign affairs and the imprecise legal status of the Party - a subject which has featured frequently in this study - have enabled the President to decide unchallenged, what is suitable for the Party and for Zambia with regard to relations with other political parties or States.

Secondly, during the colonial era the conduct of 'foreign relations' of the Protectorate of NR fell within the prerogative powers of the Crown exercised by the Governor on behalf of the Crown. The exercise of prerogative powers was not subject to question in any Court or forum. The President inherited the prerogative powers of the Crown at Independence for instance, he enters into any treaty or recognizes any Government or State or deploys the armed forces or diplomatic representatives in his own discretion in the exercise of prerogative powers. These two major factors, combined with President Kaunda's long leadership of UNIP, since 6th January, 1960, and of Zambia, since 24th October, 1964, have contributed to his dominant role in the formulation and implementation of Zambia's foreign policy and the conduct of foreign relations.

In Shipanga v. Attorney-General¹ the Supreme Court was confronted with several problems but the Court ignored the fact that the exercise of foreign policy involved political considerations and the application of prerogative powers and was accordingly not a suitable subject of judicial review. What was involved in that case was the question whether

1. (1976) ZR 227, (1977) ZR 53 and (1978) ZR 71, supra, pp. 475 - 479.

the courts could review UNIP's policy on the liberation struggle in Southern Africa. While other institutions of State and the Party organs implement Party policies as a matter of course, the judiciary stands in a different, difficult and unique position: it does not enforce Party policies unless and until the same have been converted into law by Parliament. Much of what is referred to as 'foreign policy' cannot be converted into law, hence, much of the Party's activities touching on Zambia's foreign relations are matters left in the realm of the political role of the Party exercised prominently by the President. The role of the courts is to determine any application or matter or question brought before them, and, to make such orders, issue such writs and give such directions as they might consider necessary.¹ Foreign relations are, however, one of those activities of the State in which the supervisory jurisdiction of the Courts cannot be carried out without conflict with the Party and the Government; in particular the Executive.

Under the present law UNIP is not a State organ notwithstanding the provisions of the Constitution of Zambia which recognizes it as the sole political organization in the country. The provisions of the Party Constitution that the Political, Legal and Ideological sub-Committee of the Committee of Chairmen shall work as the principal link between the Party and Liberation Movements and guide the Government on foreign policy,² can only be implemented in accordance with the laws of Zambia. The Party cannot, for instance, carry out State functions such as immigration controls. Although the Constitution of Zambia provides some safeguards against abuse of power by the Executive and protects and guarantees to all persons in Zambia the right to life, liberty, security of the person and the protection of law and freedom of conscience,

1. Zambia; Constitution of Zambia Act, 1973, Art. 29.

2. UNIP: Constitution, 1988, Art. 65(3)(B)(c) and (f).

expression, assembly and association, there is no protection from executive 'abuse' of foreign policy. A 'wrong' foreign policy can lead to shortages of essential foodstuffs through blockade or to insecurity through attacks on the population by foreign aggressors. Granted that the present method of formulating and implementing Zambian foreign policy is dominated by the President mainly by historical accident, e.g. the inherited prerogative powers bequeathed by colonial rule, there should be regular consultations on foreign policy on a broad national basis so that all sections of the community are offered an opportunity to put across their views on a matter of national importance and public interest. For instance, members of the public should be given an opportunity to comment on the Party's consistent pre-occupation with southern African affairs. Under a One-Party system where there are no alternative foreign policies, a seminar attended by representatives of the Party, the Government and other interested public organizations should be regularly convened, say once in two years, to review Zambia's foreign policy and relations in general terms.

Conclusion.

At the beginning of this study it was stated that although political parties are among the most prominent organizations in those countries in which they are allowed to function, yet little has been written about their legal origins, status and role. This study has given some insights into the origins, status and role of UNIP in Zambia under law and showed that although Zambia is governed by law, one of its most prominent and leading institutions of government, UNIP, is only vaguely recognized by law: it can even be proscribed by a public officer, the Registrar of Societies. Proposals for reform of the Party - or the Zambian One-Party Participatory Democracy - to make it a more effective instrument of national reconstruction and unity as well as the servant of a

democratic society by making it more representative, responsive and recognizable than it is at the moment, will, to some extent, depend on the status of the Party.

Given its size, significance and involvement in a wide range of social, economic and political and even quasi-judicial and some administrative functions, it is unsatisfactory that the legal status of such institution should be surrounded by ambiguity or to be matter of doubt or speculation. It is appropriate that the law explicitly provides for the status and role of UNIP and gives the Party a certain precise, however limited, legal capacity. Such a law would go a long way in removing some ambiguity and provide a clear relationship between the Party and other institutions such as the Executive, Parliament, vis-a-vis its legislative role, and, the judiciary, in particular in its role of judicial review of Party activities. The Party's opposition to Parliament enacting such legislation lest such an exercise confirmed the supremacy of Parliament at the expense of the supremacy of the Party, could be removed by a realization that Parliament is an organ of the Party and that such legislation would be the Party giving itself the status through one of its own specialized institutions.

Political system come and go. Political leaders come and go. However, while a political system and a political leadership are in existence, they should strive to work for the benefit of the majority in the community. UNIP would be democratically constituted and run within the context of its Constitution. However, the 'central role' of UNIP in Zambia's One-Party Participatory Democracy is apparently played by the President and the Party is a 'legitimizing agency' of that role. Hence, one former Prime Minister of Zambia in bidding farewell to his staff said:

We serve in the name of the People,
We serve in the name of the Party, and
We serve in the name of the President.

The bite was in the tail!

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5 & 6 Geo. 6, c. 31; 476

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23 & 24 Geo. 6 c. 5; 476

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<u>Region.</u>	<u>S.I. No.</u>	<u>Object</u>
(a) <u>Barotzeland, North-Western Rhodesia</u>		
1899, 28th November		Administration of Region
1909, 18th October		Form of legislation
(b) <u>North-Eastern Rhodesia</u>		
1900, 4th February		Administration of Region and form of legislation
1907, 6th July		Nyasaland Protectorate Governor to legislate for the Region
1909, 18th October		BSAC High Commissioner replaces Nyasaland Governor as Legislater for the Region
(c) <u>Northern Rhodesia</u>		
1911, 17th August		Amalgamation of the two Regions, formation of NR
1924, 20th February	324	Established NR Legco
1924, 20th February	325	Legco Powers and Functions
1929, 20th January	246	Creation of Native Reserves
1941, 28th February	967	Legco composition increased
1945, 21st March	620	Legco composition increased
1948, 24th February	340	Speaker replaces Governor
1953, 1st August	1199	NR in the Federation
1958, 18th September	1520	Legco electoral changes
1959, 1st October	105	Legco electoral changes
1962, 1st September	1874	Legco composition increased
1963, 3rd January	2088	Legislative Assembly
1964, 15th August	1283	Election of First President
1964, 24th October	1652	Independence Constitution
(d) <u>Other Regions.</u>		
Federation of Rhodesia and Nyasaland Order, S.I. 1953/1635		
Federation of Rhodesia and Nyasaland (Commencement) Order, 1953/2800		
Ghana (Constitution) Order, 1957/277		
Kenya (Constitution) Order, 1963/1968		
Malawi Constitution Order, 1964/916		
Nigeria (Constitution) Order, 1960/1652		
Nyasaland (Commission of Inquiry) Order, 1959/624		
Southern Rhodesia Order, 1898		
Sierra Leone (Constitution) Order, 1961/741		
Tanganyika (Constitution) Order, 1962/2275		
The Gambia Independence Order, 1965/135		
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APPENDIX 'A'

Being Answers to Questions put to Mr Mathias Mainza Chona
on recent Constitutional developments in Zambia.

(pp. 538 - 551)

Arnold M. Mtopa, LL.B (Hons) LL.M (Lond),
 Lincoln's Inn, Barrister at Law,
 School of Oriental and African Studies,
 University of London,
 Malet Street,
London, WC

Dear Sir,

You have during the past twenty-five years, been closely associated with constitutional development of Zambia as a freedom-fighter, Party and Government leader and diplomat. Your experience and views about Zambia's constitutional Development are not only important and of interest, but extremely useful to students of Zambia's Constitutional history. It is for this reason that the following questions are appropriately addressed to you:-

1. Multiple-Party System

If the 1963-1972 multiple Party System had continued to date, do you think Zambia would have developed a peaceful multiple-party system?

ANSWER NO. ONE (1)

I do not think that Zambia would have developed a peaceful multi-Party System (vide my second reading speech in December 1972 on the Constitution for the second Republic). It has now been proved that UNIP and ANC were always one Party. Former ANC members and officials have been comfortably accommodated within UNIP rank and file. If we had continued with a multi-Party System there would not have been any division based on principles or policy differences but ~~but~~ purely on personalities.

It is differences based on personalities which usually generate personal hatred and violence.

It has been the experience of our region that South Africa is being engaged in destabilising neighbours. In Angola, Mozambique, Lesotho and

/...

Zimbabwe, South Africa is engaged in supporting "opposition" or dissident groups fighting against the Governments of those independent neighbouring African States. By so doing, South Africa is reducing the rate of development. She wants to prove that Africans are worse-off under the rule of their own people.

In Zambia South Africa had already started to support certain elements in the ANC. Adamson Mushala was trained in South Africa by South Africans. No doubt more would have been trained if One Party State did not come.

South Africa was mentioned as having been involved in the organisation of the 1980 attempted coup in Zambia. South Africa was also involved in connection with the second group that wanted to rescue the people who were facing the 1980 treason charges.

This clearly means that if we had an organised opposition political group, South Africa would have supported it both politically, materially and militarily and would have made use of it in the distabllising campaign. Indeed other imperialist group of countries - west and east - would also have supported this group.

I do not think that ANC or any other political group would have won against UNIP sooner or later; there would, however, have been a lot of inter-Party violence and a lot of loss of life as was happening before the introduction of one Party and as it is happening in Zimbabwe today. I strongly believe that the introduction of One Party State in Zimbabwe (if it was popular and lovingly done) would see an end to violence there.

2. Witnesses before the National Commission

As Chairman of the National Commission on the Establishment of the One Party Participatory Democracy in Zambia in 1972, what was your impression of the thousands of people who testified before the Commission?

ANSWER NO.2

The witnesses appear to know what they had come to propose. They wanted to see peace and development in our country. They wanted a Constitution which would guarantee them and the posterity, freedom to live in happiness and contentment. They also wanted to see serious Party and Government officials dedicated to the welfare of the people. They thought these should be elected. They were genuine in feeling that we would eliminate violence by being a One Party State. People wanted to be free to choose the best people for public positions.

Though the Terms of Reference did not permit us to hear evidence for or against the introduction of One Party Participatory Democracy, we allowed a reasonable time for those who wanted to expound on the advantages or disadvantages of One Party System. There were a few who expressed opposition to the introduction of One Party System. The over-whelming majority were for it. They freely proposed the type of Constitution or administration they wanted to see under that System. The Commission also received evidence from some of the political detainees who appeared to represent the other detainees.

All in all I feel the National Commission had evidence from a cross-section of the Zambian Community who gave us valuable suggestions on which we based our Report.

3. Tanzania's Influence

It has been alleged in some quarters that the decision to introduce the one Party system in Zambia was influenced by the introduction of the similar system in Tanzania. Is this correct?

ANSWER NO.3.

Tanzania and Zambia are neighbouring countries. Tanzania got independence before Zambia. It is clear that anything that was introduced in Tanzania and which worked well was considered by the Zambian leadership. This equally applies to other countries like Malawi and Kenya. Indeed Zambia has exchanged visits with various countries, has borrowed ideas from those countries and vice versa. It would therefore not be fair to say that we were not influenced by the success of one Party System in Tanzania. If it had failed badly, we probably would not have introduced it in Zambia.

However, the method of implementing it varied according to the political situation in our country. It seems that in Tanzania the other Party or Parties simply disappeared. In our case the National Commission was appointed which included leaders of the ANC the main opposition group. Though they did not take part in the work of the Commission, the Government at least showed that they wanted the Commission to be all-embracing.

As a first step towards introduction of One Party Participatory Democracy, from December 1972 all members of Parliament became members of the one and only political party, the United National Independence Party by operation of law - card or no card. ANC MPS were free to resign their seats if they did not want to become UNIP M.P.s. In fact none did. For over six months they continued to sit as non-card carrying members of UNIP. They continued to participate in the debates and were free to vote as they liked until the Choma Declaration in 1973 which dissolved ANC.

Speaking at the Mulungushi Conference in 1984, President Nyerere stressed that each time he and his delegation attend UNIP Mulungushi General Conference, they learn a lot of things which they implement back in Tanzania. This shows that Tanzania learns as much from Zambia as we learn from Tanzania. However Zambians suffer from inferiority complex. They think that it is a one way traffic. This is not correct. A simple example is that Tanzania introduced the post of Secretary-General of the Party (senior to the post of Prime Minister) after we introduced our Constitutional set up in Zambia which was recommended by the National Commission.

4. Fundamental Human Rights

Have you been cheered or disappointed by the last ten years of One Party system in Zambia in particular in connection with the enforcement of the Fundamental Rights and Freedom of the Individual provisions (Bill of Rights) contained in the Constitution of Zambia?

ANSWER NO.4.

Due to the fact that I have been in the Government it is clear I would be biased in answering this question. I should say that I have definitely been impressed by the way His Excellency the President Dr. Kaunda and the top colleagues have adhered to the constitution both in words and actions. I definitely believe that any excesses or breaches in the enforcement of the law has been due to the Police themselves.

There could be some cases where one would have preferred that the discretion was better exercised. On the whole, I am very satisfied indeed with the way the One Party System has worked. Our situation is a sharp contrast to very low standards in other countries. The Press and the Judiciary (particulary ,the latter) are independent. One feels proud about this. The press is less free due to lack of self-control on the part of the press themselves.

5. Discipline in the Party

As a former Secretary General of the United National Independence Party were you satisfied with the

- (a) . calibre of leaders in the Party;
- (b) discipline in the Party and the Nation; and
- (c) commitment of leaders to Party policies.

ANSWER NO.5.

- (a) I feel that I am very satisfied with the calibre of leaders in the Party at Section, Branch, Ward, District, Provincial and National level. At the lower level the leaders are freely elected by Party members. From the District upwards they are generally nominated by His Excellency the President. I am generally satisfied with the leaders. ~~I am generally satisfied with the leaders.~~ I do not think that any other leader would find entirely different and better leaders than those that are there. Certainly there are some who are 'black sheep'. This would be the case anywhere in the world.
 - (b) I am completely dissatisfied with the discipline in the Party and the Nation. It is difficult to know what is the cause of this. Since I have not been asked to say why. I should just repeat that I am completely dissatisfied with the discipline in the Party and the Nation.

I should however, explain why I express satisfaction with (a) regarding calibre while expressing dissatisfaction with (b) regarding discipline and dedication. I interpret calibre in the widest sense of being entitled to hold the positions they hold; not in the sense that they are putting in their best. I do not feel that our Party officials and people in our nation are putting in their best in the tasks they are given.
 - (c) From what one hears I am also not satisfied with the commitment of the leaders to party policies. I do not read of leaders propounding on policies which have been announced. The Philosophy of Humanism is referred to in very loose terms of being humane to others. The practice or actions of the leaders appear to be different from what they proclaim. This is my impression. The solution seems to be to adjust party policies to be in line with the nature, propensity and the expectations of the ordinary party cadres. These seem to be very concerned about their own welfare when they get old or when they cease to hold office. They do not feel that the present policies are a guarantee for them. Due to the extended family system, the responsibilities of an African leader or a well to-do person is almost limitless.
-

6. National Philosophy of Humanism

Would you say the National Philosophy of Humanism has failed or succeeded in Zambia?

ANSWER NO.6.

The National Philosophy of Humanism has greatly succeeded in Zambia. Everyone is proud to proclaim Zambia's belief in Humanism. This is something which most of our people are proud of. However, the problem is that Humanism is, itself, ill defined and I do not think that the people know what Humanism is. Most of them feel that Humanism means considering other people as fellow human beings and treating them as such. To this extent Humanism has succeeded because everybody at least makes efforts to be humanistic towards other people. Our people are dedicated to this ideal as they feel it is inborn and comes from their old tradition.

I should add that, in my view, Humanism as contained in "Humanism in Zambia and A Guide to its Implementation Part 1" is generally what people have generally believed even before the coming of the white man. Moreover, Humanism Part 1 is a practical outline of how rural people can develop on the basis of self-reliance. The only problem is that there is no calculated campaign to orientate people's minds on the basis of the pamphlet. More should be done by National Guidance Ministry.

We should not talk in abstract or introduce too many phrases or schemes such as Green Revolution, Agrarian Revolution, Operation Food Production and more recently National Crusade. At least we should make it clear they are part of implementing Humanism. This makes people forget Humanism Part I which contains practical guidelines.

I would like to comment on "Humanism in Zambia Part II." I do not think our people have understood it. They have wondered where we are going. It is not clear whether it is a national philosophy or the thoughts of a forward-looking leader. I think it has made people not to be serious about Part I as well.

7. Election of President

One of your (Chona Commission's) recommendations was that the President of Zambia should hold office for two Five-Year terms only (as in the USA). The Government rejected this recommendation. Why did the Government reject this recommendation?

ANSWER NO.7.

It is difficult to answer for the Government. Evidently they did not find it appropriate in the political circumstances of that time.

I cannot speak for other members of the Commission. I myself was delighted in that most of our recommendations were implemented. I did not expect all of them to be accepted as they were mere recommendations.

I believe in the power and indelibility of the written word. Our Report remains a shopping list which the future generations of Zambians will consult for possible and practical formulas. I am sure that the "two terms" proposal will be implemented at some future.

8. Duration Unlimited

In your opinion should the President of Zambia hold office for not more than two terms, or continue in office as long as the people elect him? Are powers of the President too wide or narrow?

ANSWER NO.8.

My own sincere opinion is that a President should serve a maximum of two terms. After that he should not stand as candidate. He should give chance to others. He should not succeed himself more than two times. However he should be eligible to stand for election after another person has been President - however short the term of the other person may be. I was converted to the "two terms" provision by reasons of the witnesses who gave evidence to our Commission.

I, however, agreed with the Government that this "two terms" clause could not be applied now as Kenneth Kaunda was a father figure. He is also not associated with strong link with any major tribe in Zambia.

The function of a constitution is to bring peace and stability. No one could doubt that Zambia's peace and stability was assured as long as Kenneth Kaunda was President. This argument outweighed the arguments in our Commission which did not have a particular President in mind.

As for the present powers of the President in our Constitution, on paper, they do not appear too wide. There are provisions for him to consult. If these consultations continue to take place, they are not too wide. Otherwise they are. The leadership changes in February, 1981 and April 1985 (when both the "No.2" and "No.3" were suddenly replaced at one time without sufficient reasons) proved that under our Constitution only one person was in charge. There seems to be no collective leadership as was thought to be the case. There was no longer a real No.2 or No.3 as any of them can be removed at the stroke of the pen.

I understand that in the case of April 1985 changes, one of the top officials replaced had been elected at UNIP General Conference as a Member of the Central Committee. Unless he asked to relinquish his membership of the Central Committee, it means that our Constitution gives power to the President to remove elected Members of the Central Committee. This widens the powers than was thought to be the case.

A further feature appears to be developing of the President publicly indicating support for a particular person as candidate for Membership of the Central Committee long before the Meeting of the National Council. The Constitution has made provision for the President indicating to the (out-going) Central Committee in private the candidate whom the President of the Party intends to support. The person to be replaced should be present to prevent leadership split.

Admittedly the Presidential indication is not done as a fait accompli. However, unless strong statements can come from the Party stressing the freedom

Answer No.8.

of any members to stand against a candidate selected by the President, the conclusion will be that under our constitution the President, is in effect, empowered to remove and replace Members of the Central Committee as he sees fit. That is to say, that he can remove any elected member he wants to remove and appoint anyone else of his choice.

The Presidential powers of detention without trial, of course are, too wide. From my experience as a lawyer, I found it was extremely difficult even for an innocent person to win a Habeas Corpus application. We are lucky that Kenneth Kaunda is President. Another person could misuse the present unlimited discretion to detain practically anyone he wanted - however innocent that person is.

9. Election of Members of the Central Committee

Are you satisfied with the present method of election of Member of the Central Committee?

ANSWER NO.9.

Yes. A lot of people are calling for complete freedom of choice in the election of Members of the Central Committee. They are wrong. This method was tried in 1967. The Provinces formed pacts - Eastern with Western and North-Western while Southern Province formed a pact with the Northern, Central, Luapula and Copperbelt Provinces. The results were not respected by the people of the provinces from where defeated candidates came. Zambia may never recover from the divisions created at that fateful 1967 Mulungushi General Conference.

The present system is good in that the President selects people he proposes to be on the Central Committee. He presents it privately to the out-going Central Committee. The people who are left out are present. In drawing up the list he ensures that all parts of Zambia are represented as far as possible. This is a constitutional requirement which would not be observed if there were free elections.

After that, as a united group, the Central Committee presents the list to the National Council. This prevents divisions and pre-election campaigns before the General Conference.

The National Council as a United group then presents the list to the General Conference. The system ensures that leaders are united. This reduces to minimum the need for actual voting at a General Conference, which voting would result in divisions as in 1967. The voting should only take place if delegates are not satisfied about the provincial or ethnic balancing on the list presented or if a particularly popular candidate has been left out.

Admittedly, due to the trust and confidence in President Kaunda, most Members of the Central Committee, National Council and General Conference rarely make serious challenge to the list presented. But the right is there and I feel satisfied with the present method.

My only worry is the way the Members elected at Mulungushi are liable to be removed and replaced any time the President thinks fit. Future Presidents will regard this as their right and may over-do it. This would reduce all Members of the Central Committee to the level of mere nominees of the President.

10. One or two Constitutions?

At the moment there are two Constitutions, one for the Party and the other for the Republic. Do you support this arrangement or would you like to see one Constitution containing Party and State matters?

ANSWER NO.10.

I have, hitherto, been too British in my attitude towards the question of "legalising" the Party Constitution. I have felt that the power of the Party Constitution has depended on the correctness of the Party policies. I have not shared the view that the Party Constitution should be spelt out as being supreme to the Republican Constitution. I felt that this did not matter. I have felt that the Party Constitution was politically powerful as it was an instrument for changing the Republican Constitution. I have felt that a political Party should itself be governed by flexible rules since political situations are volatile and not predictable.

I have felt that the Party was Supreme in terms of usefulness and as a father and mother of the Republican Constitution and any institution in the land. This is the position whether the Party be regarded as an association or otherwise.

Most Socialist constitutions merely state that the ruling Party is "the leading political force". They are not as specific as we are in stating that there is one and only one Political Party - the United National Independence Party. Infact most socialist countries (including China) claim to be multi-party states.

Thanks to other Schools of thought, our Constitution is now a legally binding instrument which is part and parcel of the Republican Constitution. This is excellent. I have not heard ^{of} further suggestions that the Party and Republican Constitutions should be merged into one. I do not see any need for this.

11. Further Observations

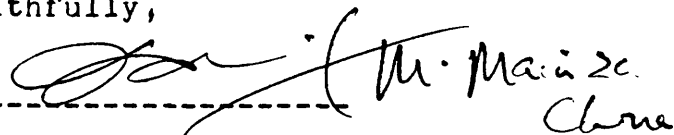
Any other observations regarding the Constitutional development of Zambia.

ANSWER NO.11.

There should be a post of Deputy Prime Minister. The Party should be wholly funded by the State and should not engage in business. People are using the Party to make money and enrich themselves while tarnishing the image of the Party as an exploiter and profiteer.

Yours faithfully,

(Signed) -----

 (Mr. Ma: a 20.
China

(Designation) -----
AMBASSADOR

(Address) Embassy of Zambia, 5 Tung Sze Street,
SAN LI TUN, PEKING. PEOPLE'S REP. OF CHINA.

(Date) --16TH JULY,-----1985

APPENDIX 'B'

Being Answers to Questions put to Mr George Lavu Mulimba
on recent developments in the Local Administration in
Zambia.

(pp. 552 - 569)



PLGAD/MOS/83/78

OFFICE OF THE PRESIDENT

OFFICE OF THE MINISTER OF STATE
NATIONAL COMMISSION FOR DEVELOPMENT PLANNING
P.O. BOX 50268
LUSAKA
ZAMBIA

8th August, 1985

Mr. Arnold M. Mtopa LL.B (Hons)LL.M (Lond),
Lincoln Inn, Barrister at Law,
School of Oriental and African Studies,
University of London,
Malet Street,
LONDON WC

Dear Mr. Mtopa,

ZAMBIAN LOCAL GOVERNMENT

I refer to your letter dated 1st May, 1985 and a remainder dated 29th July, 1985. I apologise for submitting the replies to your questions late.

Please find attached my answers to the nine (9) questions asked on the Zambian Local Government. I hope that you will find them useful material in your preparation of your PHD thesis.

Yours faithfully,

LAVU MULIMBA, MP.,
MINISTER OF STATE

Encl.....

1. TANZANIAN INFLUENCY

To what extent was the introduction of decentralised local administration in Zambia influenced by the introduction of:-

- (a) similar system in Tanzania?
- (b) one Party system in Zambia?

ANSWER

Let us first of all look at the dates of what happened in both Tanzania and Zambia in as far as decentralisation is concerned. Tanzania's system of decentralisation came into effect in July, 1972 and was abolished in 1983. Zambia's local administration system formally came into being on 1st January, 1981. It can be seen from these dates that the Zambian system was being introduced at a time when Tanzania had made it known that it was taking steps to reverse its decision on decentralisation and revert to the previous regime of Mayors and Town Clerks. There were in fact references to the Tanzanian moves in the Zambian Parliament in 1980 when the Local Administration Bill was being debated. It is therefore true that the fact that Tanzania was about to discard a similar system at the time Zambia was legislating for the same did have some influence in Zambia on some members of the general public who were made to believe that if a similar system failed in Tanzania, there were no reasons why it should succeed in Zambia. This thinking was not shared by the Party and its Government who weathered some very vehement backbench opposition in Parliament to push through certain provisions of the Local Administration Bill. It must be emphasised that the concept of decentralisation was fully supported both outside and inside Parliament. What might be referred to as opposition to the Bill in Parliament was in respect of certain clauses relating to the Chairmanship of District Councils and financial arrangements between central Government and District Councils. So the impending abolition of a similar system in Tanzania did not have a decisive negative impact on

on the introduction of the decentralised local administration system in Zambia.

The introduction of a one-Party system in Zambia, coming as it did before the decentralised local administration system on 13th December, 1972, paved the way for decentralisation in Zambia. It would have been more difficult to push through in a divided Parliament the Local Administration Act. The inclusion of the District Political Secretary, the District Chairmen of the Youth and Women's Leagues as ex-officio Councillors on the District Council would not have been possible without a One-Party system framework. The prior introduction of the One-Party system certainly made the introduction of the decentralised local administration system in Zambia much easier.

2. "TRIBAL" DISTRICT COUNCIL ADMINISTRATION

Has the introduction of local administration consolidated localization of tribal manpower in District Councils?

ANSWER

Prior to the introduction of the decentralised local administration system in Zambia, on 1st January, 1981, the appointment of staff to local Authorities was the responsibility of the Local Government Service Commission. Local Authorities were responsible for the appointment of the category of staff referred to as National Joint Council (NJC). In general, local government service staff occupied posts on the permanent establishment of the Local Authorities, including ofcourse, top management posts; while NJC staff occupied posts relating to seasonal or contractual work done by Local Authorities. The bulk of Local Authorities staff at the middle and junior management and administrative structures of Local Authorities has always been largely local. The Local Government Service Commission after the introduction of the transferrable local government service in 1975, transferred many senior management staff from their original or local councils to other local authorities in order to strengthen Zambia's motto of "One Zambia One Nation". The Local Government Service Commission, together with the local government service were abolished by the Local Administration Act of 1980, and the functions of the Local Government Service Commission transferred to the Public Service Commission. Local Government Service

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~~Commission. Local Government Service~~ personnel
were seconded to the Public Service.

The first appointments made by the Public Service Commission to District Council Secretariats at the Secretary level appeared to have been based on the need for secretaries to serve in the Districts where they could combine the advantages of knowing the local language and areas well. Although this was a general pattern at this level, there were several other Secretaries appointed to Districts which could not answer the description of being their "tribal" Districts. The general public reaction however was to regret the building up of "tribal empires" in District Councils and a commitment was made by the Public Service Commission to reverse the trend.

3. PARTY MEMBERS ONLY ELECTORATE

Has the introduction of the "Party members only electorate" improved quality of Councillors or not?

ANSWER

It is not all Councillors who are elected to the Council by a "Party members only electorate". This provision applies only to the election of Chairman of Ward Committees who, once elected as such, automatically become District Councillors by the operation of Section 10(1) (d) of the Local Administration Act. In fact there is no District Councillor who is elected directly to any District Council as such. All Councillors qualify for seats on the District Council as a result of the operation of section 10(1) of the Local Administration Act. The election of Ward Committee Chairman must therefore be seen first and foremost as an internal matter for the United National Independence Party (UNIP), in exactly the same way as other designated institutions given seats on the District Council are left to decide on the method they will adopt for nominating persons to represent them on the District Council. For example, the Councillor representing all other chiefs in the District is elected by a "Chiefsonly electorate".

The question of restricting the electorate for Ward Committee Chairman to members of the Party only was nothing to do with, nor was it ever intended to be used as a tool to improve, the quality of Councillors representing the Wards or any other institution.

4. NO MAYOR

WHAT IMPROVEMENTS HAVE BEEN BROUGHT BY THE REPLACEMENT OF THE MAYOR BY THE DISTRICT GOVERNOR AS CHAIRMAN OF DISTRICT COUNCILS?

ANSWER

The Mayor never presided over the District Council as the District Governor does now. It is not correct therefore to state that the District Governor has replaced the Mayor as Chairman of the District Council. Before Decentralisation, the Mayor chaired council meetings of local authorities charged with the administration of civic matters within the boundaries of a local authority. The District Governor was responsible for the co-ordination of the administration of Central Government departments operating within the District, as well as general supervision of the Party in the District. The District Council created by the Local Administration Act of 1980 is a new administrative unit which did not exist before 1980.

The mayor, as Chairman of local authority council meetings did not have any executive powers and the implementation of local authority council decisions was vested in the Town Clerk. This position has not changed much with the District Governor becoming Chairman of District Council meetings. The powers of the District Council are vested in the Council when it sits as Council and not in the District Governor as Chairman. The District Governor however, unlike

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the mayor, is answerable to the District Council for the implementation of Council decisions and resolutions. The Local Administration Act makes the District Governor overall supervisor of the Council's administration. As Chief Administrator of the Council, the District Governor brings to the Chair, a better personal and detailed knowledge of the general administration of the Council as well as background information on issues coming before the council for decisions, than was the case of the part-time Mayor when he chaired local authority council meetings. This advantage can however become a disadvantage in cases where members of the District Council try to reverse an administrative decision made by the Council's administration in which the District Governor played a decisive role.

5. ROLE OF CHIEFS IN LOCAL ADMINISTRATION

HAVE CHIEFS BEEN GIVEN OPPORTUNITY TO PLAY AN EFFECTIVE ROLE IN THE DEVELOPMENT OF THEIR AREAS UNDER THE DECENTRALISED SYSTEM IN VIEW OF THE PRESENCE OF DISTRICT GOVERNOR, MEMBERS OF PARLIAMENT, DISTRICT DEVELOPMENT COMMITTEES IN DISTRICTS?

ANSWER

The Statutory functions of Chiefs are well tabulated in the Chiefs Act and the Village Registration Act. The functions stated in these two Acts are performed in the Chief's area. Although the District Governor is in-charge of the whole District area, he cannot replace the Chief in his area in the performance of the duties assigned to be ^{per}formed by the Chief. Similary, a Member of Parliament will normally have several Chiefs in his or her Constituency. A Member of Parliament who wishes to succeed in fostering development in his Constituency, that is, in the various Chief's areas in his Consittuency, will enlist the active support and co-operation of chiefs in his constituency.

With the coming into effect of the Local Administration Act, 1980 the functions of the former District Development Committee have been vested in the Development Planning Committee of District Councils. This Committee makes recommendations to the District Council on the development and development plans of sections, branches, wards and the District area as a whole.

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The presence therefore of Ward Councillors, Members of Parliament and District Governors does not in any way inhibit Chiefs from playing an effective role in the development of their areas under the decentralised system. If anything, their presence is supposed to compliment the chief's efforts in bringing about development in his area.

6. TRADE UNIONS

IN MOST DISTRICT COUNCILS, TRADE UNION REPRESENTATION IS LARGE. HAS THIS TRADE UNION DOMINANCE AFFECTED DECISION-MAKING IN DISTRICT COUNCILS?

ANSWER

Although a large number of Councillors in most District Councils are nominated by trade unions, once they become Councillors, they sit as District Councillors, ~~they sit as District Councillors~~ and must make decisions in the interest of all the residents of the District Council area.

Decisions of the Council are made when the Council sits as a Council, that is, all the Councillors sitting as a District Council. Committees of the District are advisory to the Council, that is, they make recommendations only, to the Council. Trade Union Councillors do not have an in-built majority in the decision-making machinery of the District Council. There is therefore no trade union dominance in decision-making in District Councils.

7. FINANCES

WHAT HAS BEEN THE FINANCIAL POSITION OF DISTRICT COUNCILS SINCE THE INTRODUCTION OF THE DECENTRALISED LOCAL ADMINISTRATION?

ANSWER

The serious financial problems facing District Councils did not start with the introduction of the decentralised local administration system. District councils inherited serious financial problems which can be traced to the early 70s. Let me elaborate on some of them.

(a) Low Cost Housing

Prior to 1973, Government used to pay Unit Grants to local authorities to keep the rents of low cost housing down. But in 1973/74 Government withdrew the Unit grants because of the worsening position of Central Government finances. It was hoped at the time of the withdrawal of the Unit Grants that local authorities would raise the rent levels of their low-cost housing upwards to balance their housing accounts. Local Authorities were however reluctant to do so until 1980, almost late in the day when costs had piled up. The result is that the accumulated housing deficit by the end of 1983 reached K50M. Party and Government policy is to reduce and remove completely grants and subsidies for consumption. District Councils must take action to liquidate this deficit.

(b) RATES

Rates are a tax on property. All property owners are subject to this tax. The Government is not exempt from paying rates. What the Government does however is to pay a grant in lieu of rates on Government properties. Prior to 1975 the Government used to pay its rates in full. After 1975, due to a fall in Government revenue, the Government has not been meeting its liability in full. For example, Government's actual liability for 1984 was estimated at K11m and only K4.23m was contributed leaving a short fall of K6.77m in local Government revenue. The trend now is for Government to pay about 40% of its liability on rates to District Councils. Revenue from rates contributes about one-third of the total income of District Councils with valuation rolls.

(c) PERSONAL LEVY

Apart from rates, personal levy is the only other direct tax that District Councils are empowered to levy. Unfortunately, personal levy rates have remained unrevised since 1981. Attempts to have these rates revised upwards have ~~been not~~ *found favour with* ~~turned down by~~ Central Government.

(d) RETAIL PRICE OF OPAQUE BEER

The intention for giving District Councils the monopoly to retail opaque beer was that profits

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generated from the undertaking would be utilised to improve services in the low cost housing areas. What has since happened from 1964 is that the rental gross profit margin on opaque beer has decreased from 44% to 10%. The result is that most District Councils liquor establishments do not make any effective contributions to the Councils revenue. In fact most Councils are making net losses on running liquor undertakings. The answer lies in revising the retail price of opaque beer.

(e) SALARIES GRANT

The Government agreed in principle to finance the additional cost of salaries and wages resulting from the Government and ZULAWU decision to revise the salaries wages and housing allowances of local government service officers and employees with effect from 1st August, 1980. ~~to 1983~~. In 1984, however, the provision for this grant was reduced by K5.3m. The salaries grant for 1985 is the same as ~~for 1985 is the same as~~ for 1984. District Councils must find this shortfall from other sources or reduce staff.

The resources of District Councils revenue have, in general, remained unchanged before and after decentralisation. District Councils have therefore not been able to keep pace with increased costs in the provision of existing services during the same period. While costs have been going up, ~~and down and~~ the sources of revenue have remained static. It is clear that the whole

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financial relationship that exists between Central and Local Government must be looked at afresh and urgently. The case for local government ~~finance~~ *income* tax, independent of Central Government taxes, has never been stronger.

8. AS MINISTER OF STATE FOR DECENTRALISATION, OFFICE
OF THE PRIME MINISTER, WHAT ADMINISTRATIVE
PROBLEMS DID YOU ENCOUNTER?

ANSWER

The administrative problems emanated firstly, within the Division itself. The Provincial and Local Government Administrative Division as it was called, had no orientation on its new role or functions over Decentralisation. There was no clear-cut understanding of what decentralisation meant for the Division. As a result, the Division was not in a position to guide District Councils on the programme, priorities and strategy for the implementation of decentralisation.

Outside the Division the Central Committee and Cabinet had not agreed on a vertical and horizontal strategy for a programme dealing with the transfer of Central Government Ministry functions from Lusaka to District Councils since the passing of the Local Administration Act 1980. Although the name of the Division was referred to as Provincial and Local ~~Administration~~ ^{Administration} Government ~~Administration~~ Division, it was made clear to me that I had nothing to do with Provincial Administration as Provinces were separate Ministries which fell under the responsibility of Members of the Central Committee in-charge of Provinces. The supervising officer for staff in District Council Secretariats is the Permanent Secretary of each Province and the Permanent Secretary at the Division has no direct responsibility over District Council staff. Central Government Departments operating in District Council areas continue to be answerable

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directly to their Permanent Secretaries in Lusaka via their Provincial Heads based at the Provincial Headquarters.

It is my hope that the new Ministry of Decentralisation will not face the same situation and that the Standing Commission on Decentralisation will make early recommendations to the Party and its Government for a clear strategy on the implementation of decentralisation.

9. ANY OTHER OBSERVATIONS REGARDING LOCAL ADMINI-
STRATION IN ZAMBIA?

ANSWER

The distinguishing characteristic of local government or local administration from Central Government is its localness. Local administration is about local decisions, local responsiveness to local situations and above all local accountability and answerability to local people or their elected representatives. This localness must be preserved at all costs. There is need in Zambia to take early steps to ensure that Party and Government personnel appointed to District Councils are answerable and accountable to the people of the District through their elected representatives and the various decision making institutions set-up by the Party and Government at the District level.